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# UNITED STATES SENTENCING COMMISSION

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**WRITTEN TESTIMONY**

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**PUBLIC HEARING  
FEBRUARY 10-11, 2009**

# Meeting Notes - Ken Cohen

UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500, SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
(202) 502-4500  
FAX (202) 502-4699

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February 5, 2009

MEMORANDUM

TO: Acting Chair Hinojosa  
Commissioners

FROM: Judy Sheon 

SUBJECT: Materials for February 2009 Commission Meeting and Regional Public Hearing

Enclosed are materials for the Commission's February 2009 meeting and regional public hearing. (Any written statements received from the witnesses after this mailout will be sent to you as soon as we receive them.) The meeting and public hearing will take place at the Hyatt Regency Atlanta, 265 Peachtree Street, N.E., Atlanta, Georgia 30303, phone: (404) 577-1234. The Hyatt Regency is approximately 20 minutes from the Atlanta Airport. Taxi fare should be about \$30.00 each way.

On Tuesday, February 10<sup>th</sup>, the Commission will meet for a working breakfast beginning at 8:00 a.m. in the Learning Center of the Hyatt Regency Atlanta (on the ballroom level). The public hearing will begin at 9:00 a.m. in the Regency Ballroom VII. The agenda for the public hearing is in your meeting materials. A room layout is attached for your convenience.

A working lunch with local federal judges is scheduled for 12:00 noon on Tuesday in the Avanzare Steaks Restaurant, located in the Hyatt Regency. Biographies of judges who plan to attend, and circuit/district sentencing data, are in your meeting materials behind Tab 9.

The public hearing will resume after lunch on Tuesday, with Tuesday's session anticipated to conclude by 4:45 p.m.

Dinner reservations have been made for commissioners and staff for Tuesday evening at 6:30 p.m. at Ray's in the City, 240 Peachtree Street, N.E., phone: (404) 524-9224. This is not a working dinner, so attendance is optional with individual costs derived from your per diem. The restaurant is a short walk from the hotel.

On Wednesday, a working breakfast has tentatively been scheduled for 7:30 a.m. in the Learning Center of the hotel (this is the same room as Tuesday's breakfast). The public hearing resumes at 8:30 a.m. in the Regency Ballroom VII and is anticipated to conclude by 12:30 p.m. The Commission will meet thereafter in the Learning Center for a working lunch and debriefing session.

Please let me know at (202) 502-4524 if you need further assistance.

**United States Sentencing Commission  
February 2009 Meeting and Regional Public Hearing  
February 10-11, 2009**

**Hyatt Regency Atlanta  
265 Peachtree Street, NE  
Atlanta, GA**

**Tuesday, February 10, 2009**

**Working Breakfast**

**8:00 a.m. - 9:00 a.m.**

**Learning Center, Hyatt Regency (on the ballroom level)**

**Regional Public Hearing**

**9:00 a.m. - 12:00 noon**

**Regency Ballroom VII**

**Working Lunch with Local Judges**

**12:00 noon - 1:30 p.m.**

**Avanzare Steaks, Hyatt Regency**

**Regional Public Hearing Resumes**

**1:30 p.m. - 4:45 p.m.**

**Regency Ballroom VII**

**4:45 p.m. Adjourn**

**Dinner**

**6:30 p.m.**

**Ray's in the City**

**240 Peachtree Street**

**Atlanta, GA**

**(404) 524-9224**

**United States Sentencing Commission  
February 2009 Meeting and Regional Public Hearing  
February 10-11, 2009**

**Hyatt Regency Atlanta  
265 Peachtree Street, NE  
Atlanta, GA**

**Wednesday, February 11, 2009**

**Working Breakfast (tentative)**

**7:30 a.m. - 8:30 a.m.**

**Learning Center, Hyatt Regency**

**Regional Public Hearing Resumes**

**8:30 a.m. - 12:30 p.m.**

**Regency Ballroom VII**

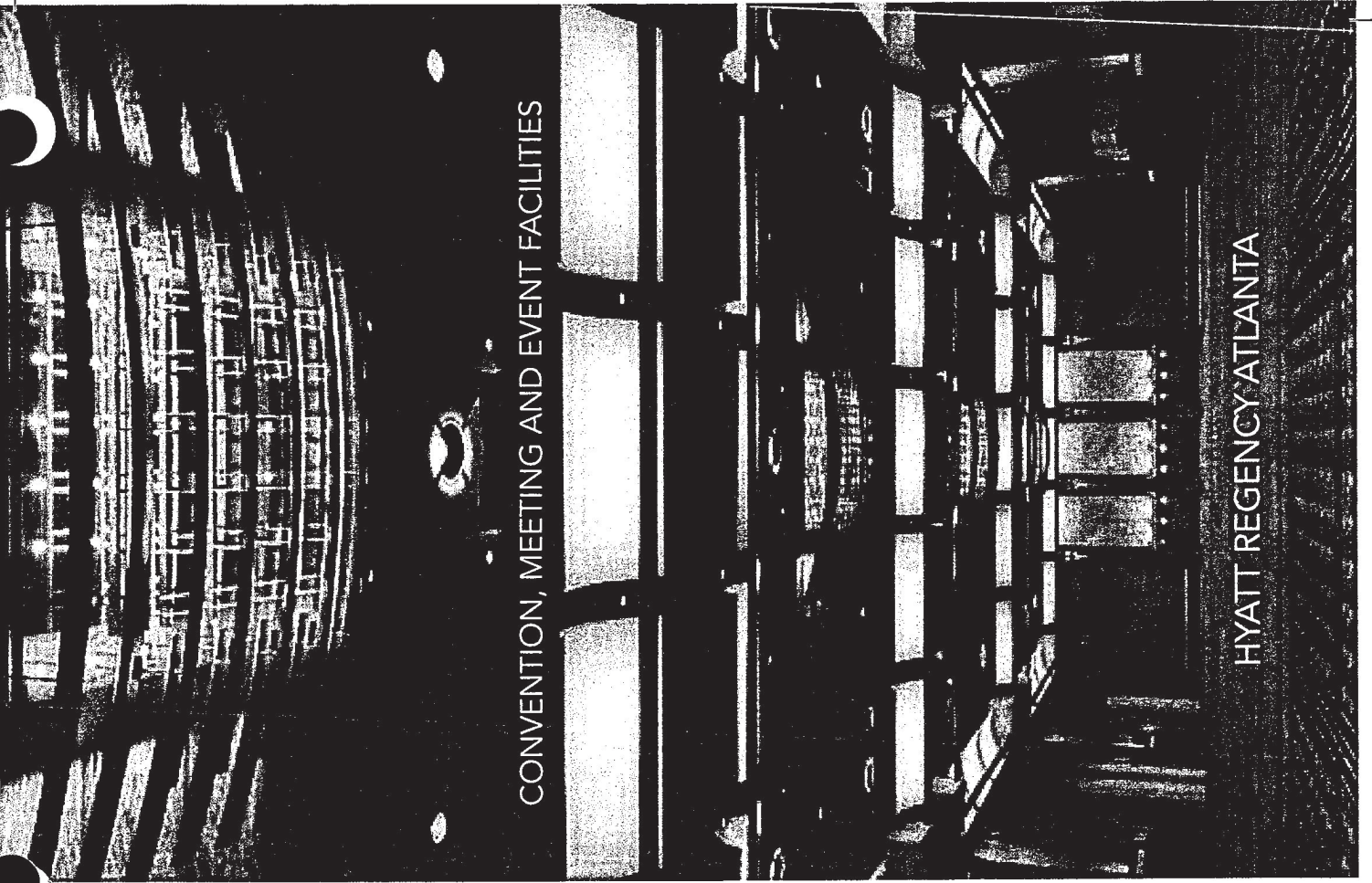
**12:30 p.m. Adjourn**

**Working Lunch/Briefing Session**

**12:30 p.m.**

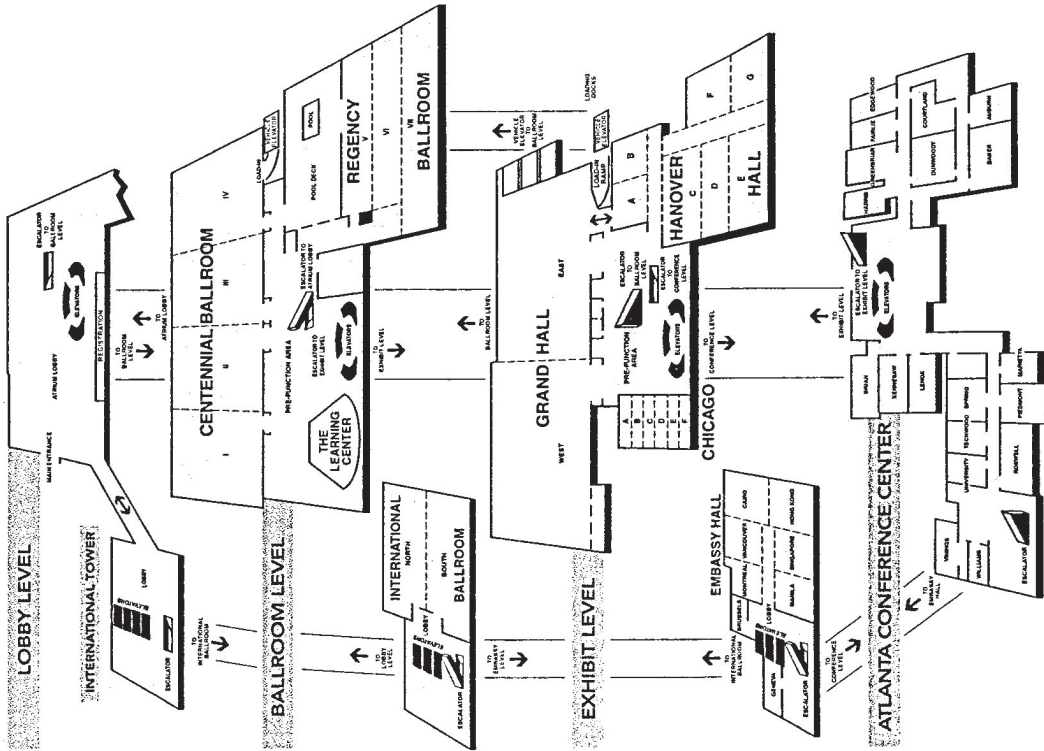
**Learning Center, Hyatt Regency**

**Adjourn Mid-Afternoon**



CONVENTION, MEETING AND EVENT FACILITIES

HYATT REGENCY ATLANTA



HYATT REGENCY ATLANTA

265 Peachtree Street, NE, Atlanta, Georgia 30303  
TELEPHONE 404 577 1234 FACSIMILE 404 588 4137  
hyattregencyatlanta.com

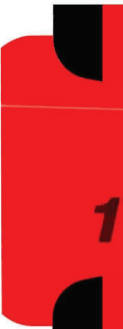


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PUBLIC HEARING  
FEBRUARY 10, 2009  
ATLANTA, GEORGIA

9:00 a.m. - 4:45 p.m.

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**I. Opening Remarks** 9:00 a.m. - 9:15 a.m.

*Honorable Ricardo H. Hinojosa*  
*Acting Chair, United States Sentencing Commission*

**II. View from the Appellate Bench** 9:15 a.m. - 10:45 a.m.

*Honorable Dennis W. Shedd*  
*Circuit Judge, Fourth Circuit*

*Honorable Gerald B. Tjoflat*  
*Circuit Judge, Eleventh Circuit*

**III. View from the Probation Office** 11:00 a.m. - 12:00 p.m.

*Ellen S. Moore*  
*Chief Probation Officer*  
*Middle District of Georgia*

*Greg Forest*  
*Chief Probation Officer*  
*Western District of North Carolina*

*Thomas Bishop*  
*Chief Probation Officer*  
*Northern District of Georgia*

**Lunch**

**12:00 p.m. - 1:30 p.m.**

**IV. View from Sentencing Practitioners**

**1:30 p.m. - 3:00 p.m.**

*Nicole Kaplan  
Assistant Federal Public Defender  
Northern District of Georgia*

*Lyle Yurko  
Charlotte, NC*

*David O. Markus  
Criminal Justice Act Panelist, District Representative  
Southern District of Florida*

*Alan DuBois  
Senior Appellate Attorney  
Federal Public Defender  
Eastern District of North Carolina*

*Amy Levin Weil  
Atlanta, GA*

**V. View from Law Enforcement**

**3:15 p.m. - 4:45 p.m.**

*William N. Shepherd  
Statewide Prosecutor  
Office of Statewide Prosecution  
Tallahassee, FL*

*Chief John Timoney  
Miami Police Department  
President, Police Executive Research Forum*

*Captain Larry Casterline  
Commander, Major Crimes Deterrence and Prevention  
High Point Police Department  
High Point, NC*

PUBLIC HEARING  
FEBRUARY 11, 2009  
ATLANTA, GEORGIA

**I. Reconvene**

**8:30 a.m.**

*Honorable Ricardo H. Hinojosa  
Acting Chair, United States Sentencing Commission*

**II. View from the District Court Bench**

**8:30 a.m. - 10:00 a.m.**

*Honorable Bob Conrad Jr.  
Chief District Judge, Western District of North Carolina*

*Honorable Gregory A. Presnell  
District Judge, Middle District of Florida*

*Honorable Robert L. Hinkle  
Chief District Judge, Northern District of Florida*

*Honorable William T. Moore Jr.  
Chief District Judge, Southern District of Georgia*

**III. View from Academia**

**10:15 a.m. - 11:15 a.m**

*Ronald Wright  
Executive Associate Dean for Academic Affairs, Professor of Law  
Wake Forest School of Law*

*Dr. Gordon Bazemore  
Chair and Professor of Department of Criminology  
Florida Atlantic University*

*Dr. Rodney L. Engen  
Associate Professor  
North Carolina State University*

IV. View from Community Interest Groups 11:15 a.m. - 12:30 p.m.

*Spencer Lawton*  
*Georgia Criminal Justice Coordinating Council*  
*Atlanta, GA*

*Hector Flores*  
*Cuban-American Bar Association*  
*Miami, FL*

*Monica Pratt Raffanel*  
*Communications Director*  
*Families Against Mandatory Minimums*  
*Lilburn, GA*







**U.S. Sentencing Commission**  
One Columbus Circle, NE  
Washington, DC 20002-8002

## **NEWS RELEASE**

**For Immediate Release**  
**February 3, 2009**

**Contact:** Michael Courlander  
Public Affairs Officer  
(202) 502-4597

### **UNITED STATES SENTENCING COMMISSION TO HOLD PUBLIC HEARING IN ATLANTA**

#### *Hearing Marks 25<sup>th</sup> Anniversary of Sentencing Reform Act*

WASHINGTON, D.C. (February 3, 2009) — The United States Sentencing Commission will hold in Atlanta on February 10-11, 2009, the first of a series of regional public hearings on federal sentencing policy. The Commission is holding these public hearings to gather feedback on federal sentencing practices and the operation of the federal sentencing guidelines.

The regional hearings coincide with the 25<sup>th</sup> anniversary of the Sentencing Reform Act of 1984 ("SRA"). The SRA established the Commission as an independent agency in the judicial branch of government and directed it to establish sentencing policies and practices for the federal criminal justice system, principally through the promulgation of federal sentencing guidelines. After holding a series of regional public hearings in 1986, publishing two drafts of sentencing guidelines for public comment, and receiving more than 1,000 letters and position papers from individuals and groups, the Commission submitted the initial set of sentencing guidelines to Congress in April 1987. After the requisite period of congressional review, the guidelines became effective on November 1, 1987. Since 1987, the guidelines have been amended more than 700 times and they have been used by federal courts to sentence more than one million defendants.

As directed by the SRA, the sentencing guidelines are designed to —

- \* incorporate the purposes of sentencing (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation);
- \* provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take in account relevant aggravating and mitigating factors; and

\* reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

At the hearings, the Commission expects to hear from a wide range of witnesses from across the nation, including the judiciary, law enforcement, prosecutors, defense attorneys, community interest groups, sentencing experts, and others interested in federal sentencing. The Commission is interested in any suggestions regarding changes to the Sentencing Reform Act and other relevant statutes, the federal sentencing guidelines and policy statements, and the Federal Rules of Criminal Procedure that, in the view of the witness, will further the statutory purposes of sentencing.

The hearing in Atlanta will be held at the Hyatt Regency Atlanta, 265 Peachtree Street, NE, Atlanta, GA. On February 10, it will begin at 9:00 a.m. and conclude at 4:45 p.m. On February 11, it will begin at 8:30 a.m. and will conclude at 12:30 p.m. The agenda (with list of witnesses) for the hearing in Atlanta is available on the Commission's web site at: [www.ussc.gov](http://www.ussc.gov). A schedule for subsequent, regional public hearings across the country will be forthcoming from the Commission.



**DATE** 01/13/2009  
**TIME** 18:30 - 19:00

**LOCATION** National  
**PROGRAM** NBC Nightly News

## **MEXICO'S DRUG WAR SHIFTS NORTH OF THE BORDER**

### **BROADCAST TRANSCRIPT**

**BRIAN WILLIAMS**, anchor:

We are back with tonight's in-depth report. It has to do with some big trouble with the neighbors, in this case it's Mexico, and the trouble has to do with drugs. Today, President Bush had his final meeting with Mexican President Felipe Calderon and the drug violence on both sides of the Mexican border was topic number one, in part because it's coming here. NBC's Mark Potter reports now on just how bad things have gotten.

**MARK POTTER** reporting:

In Alabama, police were shocked to find the bodies of five men who'd been brutally tortured in an apartment near Birmingham. In Arizona, in this bullet-riddled house, another man was killed by a team of assassins posing as Phoenix police officers. In both cases authorities say some of the horrific violence of the Mexican drug war is now playing out on US soil with killings ordered by Mexican traffickers.

**Mr. WILLIAM NEWELL** (Bureau of Alcohol, Tobacco and Firearms): We're seeing drug cartels with their potential for extreme violence just like in Mexico throughout the United States. So this is a problem not just in Mexico, this is our problem.

**POTTER**: A recent report by the US Justice Department said "Mexican DTOs--drug trafficking organizations--represent the greatest organized crime threat to the United States." And federal officials say traffickers operate now in virtually every major city in the country and in many rural areas.

The DEA says 90 percent of all cocaine smuggled into the US comes across the Mexican border, often in semi-trailer trucks. The Mexican cartels are also major suppliers of methamphetamine, marijuana and heroin.

Officials say Mexican smugglers have taken over almost all the street level distribution in the United States, and one of their biggest operational hubs is right here in Atlanta, where they supply the entire Eastern Seaboard with illegal drugs. This multibillion-dollar-a-year business is extremely well organized.

**Mr. RODNEY BENSON** (DEA Supervisor): Money's collected, brought back down here to metro Atlanta where it's accounted for and then it is heat sealed, secured and then shipped back down to cartel leadership.

**POTTER**: And US authorities say the Mexican traffickers are also very well armed. As one federal official put it, with drugs and violence, the Mexican border has now moved north. Mark Potter, NBC News, Atlanta.

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**UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500 SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
TELEPHONE: (202) 502-4500  
FACSIMILE: (202) 502-4699**

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January 21, 2009

Honorable William T. Moore, Jr.  
United States Chief District Judge  
Southern District of Georgia  
308 Tomochichi United States Courthouse  
125 Bull Street  
Savannah, GA

Dear Chief Judge Moore:

Thank you for agreeing to testify before the United States Sentencing Commission in Atlanta, Georgia, on February 10-11, 2009. This public hearing is the first of a series of regional hearings to mark the 25<sup>th</sup> anniversary of the passage of the Sentencing Reform Act of 1984 ("SRA"). The panel on which you are participating is titled "View from the District Court Bench" and is scheduled for Wednesday, February 11, at 8:30 a.m.

The Commission is interested in receiving testimony about how the federal sentencing system is operating and what recommendations, if any, witnesses have for changes to the federal sentencing system that might be appropriate. Witnesses are asked to submit written statements to the Commission by Thursday, February 5, 2009, to the extent possible, and to limit their oral statements to 5 to 10 minutes. A list of topics that may help you prepare your statement is attached.

The public hearing will take place at the Hyatt Regency Atlanta, located at 256 Peachtree Street, NE. The Commission will pay for travel and lodging costs associated with your attending the hearing. The Commission is holding a block of sleeping rooms for witnesses, the cost of which will be paid directly by the Commission. Please call the Hyatt at (404) 577-1234 by January 30, 2009, to reserve your room.

You may contact Omega World Travel at (866) 450-0401 to arrange for an airline ticket that will be charged to the Commission's account. Advise the travel representative that you are one of the witnesses at the Commission's Atlanta public hearing, and Omega will book your ticket. To obtain

reimbursement for your meals, you may choose to claim \$49 per day (no itemization of meals) or up to \$73.50 per day with itemization and receipts. In addition, you will be reimbursed for mileage, parking and other expenses (phone calls up to \$5 per day, taxis) that you incur while on official business. In order to receive reimbursement, you must provide receipts. The Commission will provide you a

set of written instructions for filing your claim. This will include an electronic funds transfer (EFT) form (attached) that requires your banking information in order to receive your reimbursement. If you have any questions regarding reimbursement, please contact Alexandria Tounkara at [Atounkara@ussc.gov](mailto:Atounkara@ussc.gov), or Maria Petruccelli at [Mpetruccelli@ussc.gov](mailto:Mpetruccelli@ussc.gov).

Thank you again for agreeing to testify at this public hearing. If you have any questions, please call me at (202) 502-4524 or Ken Cohen at (202) 502-4523.

Very truly yours,

Judith Sheon  
Staff Director

United States Sentencing Commission  
Public Hearing – “The Sentencing Reform Act of 1984: 25 Years Later”  
Atlanta, Georgia  
February 10-11, 2009

The Commission is interested in receiving testimony about how the federal sentencing system is operating and what recommendations, if any, witnesses have for changes to the federal sentencing system that might be appropriate. In particular, the Commission is interested in the following topics:

1. How has the advisory nature of the federal sentencing guidelines after the Supreme Court’s decision in *United States v. Booker*, 543, U.S. 220 (2005) affected federal sentencing?
2. What should be the role of the federal sentencing guidelines in federal sentencing? What, if any, changes should be made to the federal sentencing guidelines?
3. Does the federal sentencing system strike the appropriate balance between judicial discretion and uniformity and certainty in sentencing?
4. How should offense and offender characteristics be taken into account in federal sentencing? What, if any, changes should be made with respect to accounting for offense and offender characteristics?
5. What type of analysis should courts use for imposing sentences within or outside the guideline sentencing range?
6. How have *Booker* and subsequent Supreme Court decisions affected appellate review of sentences?
7. What, if any, recommendations should the Commission make regarding the Federal Rules of Criminal Procedure?
8. What, if any, recommendations should the Commission make to Congress with respect to statutory changes regarding federal sentencing?

**UNITED STATES SENTENCING COMMISSION  
ATLANTA, GA  
FEBRUARY 10-11, 2009  
PUBLIC HEARING**

**Panel One**  
**VIEW FROM THE APPELLATE BENCH**



PUBLIC HEARING  
FEBRUARY 10, 2009  
ATLANTA, GEORGIA

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**II. View from the Appellate Bench**

**9:15 a.m. - 10:45 a.m.**

*Honorable Dennis W. Shedd  
Circuit Judge, Fourth Circuit*

*Honorable Gerald B. Tjoflat  
Circuit Judge, Eleventh Circuit*

*Honorable Rosemary Barkett  
Circuit Judge, Eleventh Circuit*

CANCELED  
02-05-09

*Honorable Dennis W. Shedd*

*Circuit Judge, United States Court of Appeals for the Fourth Circuit*

Federal Judicial Service:

Judge, U. S. District Court, District of South Carolina

Nominated by George H.W. Bush on October 17, 1990, to a seat vacated by Karen LeCraft Henderson; Confirmed by the Senate on October 27, 1990, and received commission on October 30, 1990. Service terminated on December 10, 2002, due to appointment to another judicial position.

Judge, U. S. Court of Appeals for the Fourth Circuit

Nominated by George W. Bush on September 4, 2001, to a seat vacated by Clyde H. Hamilton; Confirmed by the Senate on November 19, 2002, and received commission on November 26, 2002.

Education:

Wofford College, B.A., 1975

University of South Carolina Law Center, J.D., 1978

Georgetown University Law Center, LL.M., 1980

Professional Career:

Member of staff, U.S. Sen. Strom Thurmond, 1978-1988

Administrative assistant to U.S. Sen. Strom Thurmond, 1982-1984

Chief counsel and staff director, U.S. Senate Committee on the Judiciary, 1985-1986

Private practice, Columbia, South Carolina, 1988-1991

Adjunct professor, University of South Carolina School of Law, 1989-1992

**Judge Dennis W. Shedd, United States Court of Appeals for the Fourth Circuit**

***United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007):** Tax evasion case involving a husband and wife; defendants claimed the district court erred in calculating the tax loss amount when it did not subtract any deductions the defendants could have claimed but for the failure to file returns. First, defendants relied on *United States v. Schmidt*, 935 F.2d 1440 (4th Cir. 1991) (holding that it was error to disallow deductions a defendant could have taken under the meaning of “tax loss” as the term was defined at §2T1.3(a) in the 1989 Guideline Manual). The circuit court stated that *Schmidt* could not longer be relied upon because in 1993 the Commission amended the term “tax loss” to mean “the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)’ rather than ‘the total amount of the tax that the taxpayer evaded or attempted to evade.’” The circuit court also rejected the defendants’ second argument that the language at §2T1.1(c)(2)(A) mandates the calculation of deductions before the tax loss is determined.<sup>1</sup> The circuit court joined the Second and Tenth Circuits by holding that defendants forfeited the opportunity to claim any deductions when they chose not to file their income tax returns. The circuit court noted that having the district court attempt to reconstruct a tax return *post hoc* to determine which, if any deductions, the defendants could claim would force the district court to consider the many “hypothetical ways” the defendants could have completed their returns.

***United States v. Geddings*, 278 F. App’x 281 (4th Cir. 2008):** Public corruption/conflict of interest case. defendant was a member of the North Carolina Lottery Commission when it considered firms that would receive contracts for the state lottery. Prior to defendant’s appointment to the Commission, he failed to disclose a business relationship with one of the competing firms. defendant was convicted of five counts of mail fraud (18 U.S.C. § 1341) for using the mail “to execute a scheme to defraud the citizens of North Carolina of his honest services.” At sentencing, the district court applied §2C1.1 to determine the defendant’s base offense level of 14, applied a four-level enhancement for being a high-level public official (§2C1.1(b)(3)), and applied a two-level enhancement for obstruction of justice (§3C1.1), resulting in a total offense level of 20 (33-41 months at CHC-I). After considering the factors at 18 U.S.C. § 3553(a), the court departed upward by seven months and sentenced defendant to 48 months. defendant challenged the sentence as unreasonable arguing that the court should have applied §2C1.3 “because that guideline section applies to conflict of interest offenses.” The circuit court reviewed the sentence for abuse of discretion, citing the standard of review from *United States v. Pauly*, 511 F.3d 468, 473 (4th Cir. 2007) (*citing Gall v. United States*, 128 S. Ct. 586, 596 (2007)). The circuit court rejected defendant’s argument. The circuit court noted that section 1341 is referenced to §2C1.1 in Appendix A and further observed that the district court gave notice to the parties that it was considering an upward departure from the advisory 33-41 month guideline range.

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<sup>1</sup>Specifically, defendants cited the following language from §2T1.1(c)(2)(A): “If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income . . . less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.” (emphasis added)

PLACEHOLDER FOR TESTIMONY  
OF

Honorable Dennis W. Shedd  
Circuit Judge, Fourth Circuit

*Honorable Gerald Tjoflat*

*Circuit Judge, United States Court of Appeals, Eleventh Circuit*

Federal Judicial Service:

Judge, U. S. District Court, Middle District of Florida

Nominated by Richard M. Nixon on October 7, 1970, to a new seat created by 84 Stat. 294;

Confirmed by the Senate on October 13, 1970, and received commission on October 16, 1970.

Service terminated on December 12, 1975, due to appointment to another judicial position.

Judge, U. S. Court of Appeals for the Fifth Circuit

Nominated by Gerald Ford on November 3, 1975, to a seat vacated by John Milton Bryan

Simpson; Confirmed by the Senate on November 20, 1975, and received commission on

November 21, 1975. Service terminated on October 1, 1981, due to assignment to another court.

Judge, U. S. Court of Appeals for the Eleventh Circuit

Reassigned October 1, 1981; Served as chief judge, 1989-1996.

Education:

University of Virginia; University of Cincinnati

Duke University School of Law, LL.B., 1957

Professional Career:

U.S. Army Corporal, 1953-1955

Private practice, Jacksonville, Florida, 1957-1968

Judge, Circuit Court, Fourth Judicial Circuit of Florida, Jacksonville, 1968-1970

## Judge Gerald Bard Tjoflat, United States Circuit Judge, Eleventh Circuit Court of Appeals

During the years leading up to passage of the Sentencing Reform Act, Judge Tjoflat (who served on the Fifth Circuit prior to the creation of the Eleventh Circuit in 1981), testified and wrote on different bills being considered by Congress. See *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95<sup>th</sup> Cong., 2d Sess. 1890 (1978); Tjoflat, *A Practical Look at the Sentencing Provisions of S. 1722*, 72 J. Crim. L. & Criminology 555 (1981).<sup>1</sup>

Post-*Booker*, but prior to the Supreme Court's decisions in *Rita*, *Gall*, or *Kimbrough*, Judge Tjoflat wrote the opinion in *United States v. Hunt*, 459 F.3d 1180, 1184-85 (11th Cir. 2006), addressing the question of "the amount of weight to accord the Guidelines in light of *Booker*," in applying the 3553(a) factors. The court refused to adopt "any across-the-board prescription regarding the appropriate deference to the Guidelines," and held that district courts may not regard the guidelines as presumptively or *per se* reasonable. Rather, in applying the § 3553(a) factors to determine a reasonable sentence, a district court must decide how much weight to give the guidelines in each individual case, recognizing that there are "many instances where the Guidelines range will not yield a reasonable sentence." Thus, the court held, "a district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." *Id.* at 1185.

Post-*Gall/Kimbrough*, Judge Tjoflat wrote the opinion in *United States v. Brown*, 526 F.3d 691 (11th Cir. 2008). In *Brown*, the court rejected the *ex post facto*/due process claim of a defendant who had been sentenced as a career offender. The defendant contended that, at the time he entered his guilty plea, he believed that he would not be sentenced as a career offender. However, after his plea, but before his sentencing, the Eleventh Circuit ruled, in *United States v. Searcy*, 418 F.3d 1193, 1198 (11th Cir. 2005), that a conviction under 18 U.S.C. § 2422(b) (enticing a minor to engage in criminal activity) constitutes a "crime of violence" for purposes of the career offender guideline. In rejecting *Brown's* *ex post facto*/due process claim, the Eleventh Circuit, relying on a previous case, *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005), held that *Brown* was on notice when he pled guilty that he could be sentenced up to the statutory maximum penalty for his offense.

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<sup>1</sup> Judge Tjoflat's involvement in sentencing reform is discussed in Stith and Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 238 n.92, 251 n.167, 255 & n.189 (1993).

The *Brown* court further rejected the defendant's claim that it was error under *Shepard v. United States*, 544 U.S. 13 (2005), to rely on his Ohio burglary convictions to enhance his sentence under the career offender guideline because the uncertified Ohio docket sheets obtained from the county clerk's website, relied on by the government, were not records of "conclusive significance." The court clarified that in determining the *fact* of a prior conviction, a court may consider any information, including reliable hearsay, without running afoul of the Sixth Amendment. If the statute under which the defendant was convicted is ambiguous, then, in applying the *Taylor* categorical approach to determine whether the conviction constitutes a "crime of violence" under §4B1.2, *Shepard* limits the types of documents that may be relied upon. In *Brown*, there was no question that the defendant's prior convictions for aggravated burglary were "crimes of violence;" the only question was whether the government had adequately proven that he had in fact been convicted of such crimes. As to that question, *Shepard* did not control. The court relied on its earlier decision in *United States v. Cantellano*, 430 F.3d 1142 (11<sup>th</sup> Cir. 2005), holding that "*Shepard*'s evidentiary restrictions are non-constitutional and apply only to the second stage of the sentencing court's determination of whether a prior offense constitutes a predicate offense for the imposition of the career offender enhancement."

*United States v. Ellisor*, 522 F.3d 1255 (11th Cir. 2008) was a high profile mail fraud case in which the defendant sold tickets to thousands of Miami schoolchildren and their parents who expected to attend a "Christmas From Around the World Extravaganza" where they would meet foreign diplomats and see characters dressed up like Harry Potter. Their hopes were dashed when the defendant spent the money on lavish purchases for himself. The district court departed upward based on underrepresentation of criminal history under USSG §4A1.3. Judge Tjoflat wrote the opinion in which the Eleventh Circuit upheld the sentence against a challenge that it was procedurally unreasonable because the court did not properly consider the § 3553(a) factors.

Judge Tjoflat was on the panel in *United States v. Valladares*, 544 F.3d 1257 (11th Cir. 2008), a health care fraud case where the court, in a per curiam opinion, affirmed the sentence against a challenge that the district court misapplied the guidelines. (The sentence was not claimed to be substantively unreasonable).

In *United States v. Thomas*, 545 F.3d 1300 (11th Cir. 2008), also a per curiam opinion in which Judge Tjoflat was on the panel, the court upheld the district court's denial of the defendant's § 3582(c)(2) motion based on the retroactive crack cocaine amendment. The defendant had been sentenced under 18 U.S.C. § 924(e) as an armed career criminal and, therefore, he was not eligible for a sentence reduction because application of the amendment did not have the effect of reducing his guidelines sentencing range. The court relied on its previous case, *United States v. Moore*, 541 F.3d 1323 (11<sup>th</sup> Cir. 2008), which reached the same conclusion as to defendants who had been sentenced as career offenders.

In an unpublished, per curiam opinion in *United States v. Anderson*, 267 F. App'x. 847 (11th Cir. Feb. 28, 2003), the panel (including Judge Tjoflat) reconsidered its earlier opinion vacating the sentence of a defendant convicted of securities fraud. In the earlier decision, the court found the downward variance from a guidelines range of 18 to 24 months to probation to

• be unreasonable. Upon reconsideration, the court determined that, in light of *Gall*, the probationary sentence was reasonable because the court provided “a sufficiently compelling [justification] to support the degree of the variance” (citing *Gall*, 128 S. Ct at 597), and the sentence “adequately achieve[d] ‘the purposes of sentencing stated in § 3553(a)’” (citing *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008)).

In the following unpublished, per curiam opinions, Judge Tjoflat was on panels that upheld upward variances from the advisory guidelines range claimed to be unreasonable by defendants:

*United States v. Aguilar*, 2008 WL 169798 (11th Cir. Jan. 22, 2008); *United States v. Ramirez*, 2008 WL 185509 (11th Cir. Jan. 23, 2008), *cert. denied*, 128 S. Ct. 2520 (2008); *United States v. Quintero*, 264 F. App’x. 792 (11th Cir. Feb. 4, 2008); *United States v. Barrington*, 270 F. App’x 874 (11th Cir. Mar. 25, 2008); *United States v. Gonzalez*, 277 F. App’x. 884 (11th Cir. May 13, 2008); *United States v. Minton*, 283 F. App’x. 774 (11th Cir. June 26, 2008); *United States v. Vidal*, 275 F. App’x 873 (11th Cir. Apr. 29, 2008); *United States v. Tyler*, 277 F. App’x. 866 (11th Cir. May 8, 2008); *United States v. Barnes*, 288 F. App’x. 683 (11th Cir. Aug. 8, 2008); *United States v. Broxton*, 295 F. App’x. 339 (11th Cir. Oct. 2, 2008); *United States v. Stephens*, 2008 WL 4458184 (11th Cir. 2008); *United States v. Martich*, 2008 WL 4569894 (11th Cir. Oct. 14, 2008); *United States v. Leeks*, 2008 WL 4951800 (11th Cir. 2008).

PLACEHOLDER FOR TESTIMONY  
OF

Honorable Gerald B. Tjoflat  
Circuit Judge, Eleventh Circuit

*Honorable Rosemary Barkett*

*Circuit Judge, U. S. Court of Appeals for the Eleventh Circuit*

Federal Judicial Service:

Judge, U. S. Court of Appeals for the Eleventh Circuit

Nominated by William J. Clinton on September 24, 1993, to a seat vacated by Paul Hitch Roney;

Confirmed by the Senate on April 14, 1994, and received commission on April 15, 1994.

Education:

St. Joseph's College, A.A., 1959

Spring Hill College, B.S., 1967

University of Florida College of Law, J.D., 1970

Professional Career:

Member, Sisters of St. Joseph, 1956-1967

Teacher, elementary and junior high school, St. Augustine, Florida, 1960-1968

Private practice, West Palm Beach, Florida, 1971-1979

Judge, Fifteenth Judicial Circuit Court, State of Florida, 1979-1984

Chief Judge, Fifteenth Judicial Circuit Court, 1983-1984

Judge, Fourth District Court of Appeals, State of Florida, 1984-1985

Justice, Florida Supreme Court, 1985-1994

Chief Justice, Florida Supreme Court, 1992-1994

## **Judge Rosemary Barkett, United States Circuit Judge, Eleventh Circuit Court of Appeals**

Consistent with her role as a frequent dissenter on the court, Judge Barkett wrote a dissenting opinion and a specially concurring opinion (in which she essentially disagreed with the majority) in the following two sentencing cases. Although *Faust* was pre-*Gall/Kimbrough*, it is a significant opinion and sheds light on Judge Barkett's sentencing jurisprudence.

### ***United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008) (Barkett, J., dissenting).**

In a per curiam opinion, the court held that *Kimbrough v. United States*, 128 S. Ct. 558 (2007), did not overrule prior cases prohibiting downward variances based on the availability of "fast-track" departures in only some federal districts. See *United States v. Castro*, 455 F.3d 1249, 1252-53 (11th Cir. 2006) (reasoning that "[a]ny disparity created by section 5K3.1 does not fall within the scope of section 3553(a)(6)" because "[w]hen Congress directed the Sentencing Commission to allow the [fast-track] departure for only participating districts, Congress implicitly determined that the [sentencing] disparity was warranted"); see also *United States v. Arevalo-Juarez*, 464 F.3d 1246 (11th Cir. 2006) (vacating downward variance based on disparity created by §5K3.1 in light of *Castro*); *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007) (same, and further observing that sentences imposed on defendants in districts without fast-track programs are not necessarily "greater than necessary" to achieve purposes of sentencing solely because similarly-situated defendants in fast-track districts are eligible to receive lesser sentences).

The *Vega-Castillo* majority reasoned that because *Kimbrough* did not discuss *Castro* or its progeny, the court was bound by its narrow prior precedent rule to apply those earlier cases. Moreover, the holdings of *Kimbrough* and *Castro* were distinguishable because they dealt with distinct guideline provisions. Also, *Kimbrough* addressed the district court's discretion to vary based on a disagreement with a guideline, as opposed to a congressional policy and *Kimbrough* also dealt with a guideline that did not exemplify the Commission's exercise of its characteristic institutional role.

In her dissent, Judge Barkett stated her belief that *Kimbrough* "left no room for upholding our prior precedents" on fast-track cases which had been "undermined . . . to the point of abrogation." 540 F.3d at 1239. Judge Barkett aligned herself with the First Circuit in *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008), which held that after *Kimbrough*, "consideration of fast-track disparity is not categorically barred as a sentence-evaluation datum within the overall ambit of § 3553(a)," and that post-*Kimbrough*, "sentencing courts possess sufficient discretion under section 3553(a) to consider requests for variant sentences premised on disagreements with the manner in which the sentencing guidelines operate." *Rodriguez*, 527 F.3d at 229, 231 (quoted in *Vega-Castillo*, 540 F.3d at 1241).

### ***United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006) (Barkett, J., dissenting)**

In this post-*Booker*, pre-*Gall* decision, the Court relied on a previous post-*Booker* case, *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005), holding that nothing in *Booker* prohibited courts from considering relevant acquitted conduct under an advisory guidelines regime. Accordingly, the *Faust* court concluded that under an advisory guidelines scheme, courts can consider relevant acquitted conduct so long as the facts underlying the

conduct were proved by a preponderance of the evidence and the sentence imposed did not exceed the maximum sentence authorized by the jury's verdict. 456 F.3d at 1348. In a lengthy opinion, Judge Barkett specially concurred in the majority's opinion solely because *Duncan* was binding precedent, but she otherwise opined that sentence enhancements based on acquitted conduct are unconstitutional both under the Sixth Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 1349.

No other published opinions of Judge Barkett were found in a review of the post-*Gall/Kimbrough* case law of the Eleventh Circuit. In the following per curiam, unpublished opinions, Judge Barkett was on panels that upheld upward variances from the advisory guidelines range claimed to be unreasonable by defendants:

*United States v. Arneto-Anaya*, 262 F. App'x. 936 (11th Cir. Jan. 16, 2008); *United States v. McCloud*, 262 F. App'x. 964 (11th Cir. Jan. 22, 2008); *United States v. Santos-Chavez*, 2009 WL 154392 (11th Cir. Jan. 23, 2009); *United States v. Barrington*, 270 F. App'x 874 (11th Cir. Mar. 25, 2008); *United States v. Amati*, 273 F. App'x. 790 (11th Cir. Apr. 8, 2008), *cert. denied*, 129 S. Ct. 230 (2008); *United States v. Pina-Suarez*, 280 F. App'x. 813 (11th Cir. May 28, 2008), *cert. denied*, 129 S. Ct. 517 (2008); *United States v. Matthews*, 279 F. App'x. 956 (11th Cir. June 4, 2008); *United States v. Fenwick*, 281 F. App'x. 946 (11th Cir. June 17, 2008); *United States v. Billups*, 2008 WL 4649387 (11th Cir. Oct. 22, 2008); *United States v. Valdes*, 2008 WL 4768870 (11th Cir. Nov. 3, 2008).

In *United States v. Zavala*, 2008 WL 4997052 (11th Cir. Nov. 25, 2008), the government appealed a downward variance resulting in a 178-month sentence in a methamphetamine conspiracy case. (The opinion does not mention the applicable guidelines range). In a per curiam, unpublished opinion, the panel (including Judge Barkett) affirmed, noting that the district court had properly applied the § 3553(a) factors, particularly § 3553(a)(6), in light of the fact that three co-defendant family members received 188-month sentences, a co-defendant brother, who was the ringleader, received a 188-month sentence after a §5K1.1 motion, and the defendant was a lesser player in the scheme.

In *United States v. Puche*, 282 F. App'x. 795 (11th Cir. June 24, 2008), *cert. denied*, 2009 WL 56269 (2009), the government appealed a time-served sentence of 66 months' imprisonment in a money laundering case where the guidelines range was 135-168 months. In a per curiam, unpublished opinion, the panel found that the sentence was substantively unreasonable because the district court had relied on a legally erroneous factor when it determined that the loss amount had been determined in violation of the defendants' Sixth Amendment rights because it had not been submitted to the jury. The panel further found that the court's error was not harmless. Judge Barkett dissented, finding that, although there was some ambiguity in the court's sentencing order, it did not clearly indicate that court's variance was based on the legally erroneous ground.

PLACEHOLDER FOR TESTIMONY  
OF

Honorable Rosemary Barkett  
Circuit Judge, Eleventh Circuit

**UNITED STATES SENTENCING COMMISSION  
ATLANTA, GA  
FEBRUARY 10-11, 2009  
PUBLIC HEARING**

**Panel Two**  
**VIEW FROM THE PROBATION OFFICE**



PUBLIC HEARING  
FEBRUARY 10, 2009  
ATLANTA, GEORGIA

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**III. View from the Probation Office**

**11:00 a.m. - 12:00 p.m.**

*Ellen S. Moore*  
*Chief Probation Officer*  
*Middle District of Georgia*

*Greg Forest*  
*Chief Probation Officer*  
*Western District of North Carolina*

*Thomas Bishop*  
*Chief Probation Officer*  
*Northern District of Georgia*

*Ellen S. Moore*  
*Chief Probation Officer*  
*Middle District of Georgia*

Ellen S. Moore earned a B.S. in Criminal Justice from Georgia Southern University and an MPA from Georgia College & State University. In January 2007, she was appointed Chief U.S. Probation Officer for the Middle District of Georgia. She previously held the positions of Supervising U.S. Probation Officer, and Sentencing Guidelines Specialist following her appointment as a federal probation officer in 1989. Ms. Moore served as the 11th Circuit's Representative of the United States Sentencing Commission's Probation Officers Advisory Group and as Chair of the advisory group for several years. She has conducted training on Federal Sentencing Guidelines at the local, circuit, and national levels.

PLACEHOLDER FOR TESTIMONY  
OF

Ellen S. Moore  
Chief Probation Officer  
Middle District of Georgia





*Gregory A. Forest*  
*Chief Probation Officer*  
*Western District of North Carolina*

Greg Forest is the Chief U.S. Probation Officer for the Western District of North Carolina. Mr. Forest began his career as a federal probation officer in 1995, and in 2000 he was promoted to Drug and Mental Health Treatment Specialist. While serving in this position, he supervised the Drug and Mental Health Unit in Charlotte, NC. In 2002, Mr. Forest was appointed by President Bush as the U.S. Marshal for the Western District of North Carolina and served in this capacity until March 2004 when he was appointed as the Chief U.S. Probation Officer in the Western District of North Carolina. In July 2004, he formed the Offender Workforce Development Team in the Western District of North Carolina. Mr. Forest served as the Chair of the Workforce Development Working Group, which was comprised of five chief probation and pretrial services officers who are promoting employment and vocational programs in their respective districts.

Prior to joining the U.S. Probation Office, Mr. Forest was employed with the Charlotte-Mecklenburg Police Department from 1986-1995 where he spent six years as a Vice and Narcotics Investigator and an In-Service Training Instructor. Currently, he serves as a facilitator for new officer training at the Federal Law Enforcement Training Center in Charleston, SC and for the Federal Judicial Center in Washington, DC.

**Statement of Greg Forest, Chief United States Probation Officer  
Western District of North Carolina**

United States Sentencing Commission  
Regional Hearings on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act  
of 1984

February 10, 2009

**View from the Probation Office**

As many already know, the Judicial Conference of the United States initially opposed the establishment of the United States Sentencing Commission and the federal sentencing guidelines it promulgated.

When confronted with a bill that would establish an independent five-person Sentencing Commission within the judicial branch, which would promulgate a set of sentencing guidelines,<sup>1</sup> the Conference opposed the measure, indicating that a straightforward review of sentences (either by appellate review or by a three-judge panel) would be preferable to the legislation.<sup>2</sup> Later, commenting on legislative provisions that culminated with the passage of the Sentencing Reform Act of 1984 ("SRA"), the Judicial Conference suggested "that if the integrity of the principle of separation of powers is to be maintained, another needless and expensive entity should not be created which would in many ways only duplicate the services currently performed effectively and efficiently by the Administrative Office of the United States Courts and the Federal Judicial Center."<sup>3</sup> This view was echoed in subsequent meetings of the Judicial Conference.<sup>4</sup>

The newly-promulgated federal sentencing guidelines were initially attacked in hundreds of constitutional challenges.<sup>5</sup> The Judicial Conference remained wary of them, as well.<sup>6</sup> After the

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<sup>1</sup> S. 2966, 94th Cong., 2d Sess. (1975).

<sup>2</sup> JCUS-APR 76, pp. 11-12.

<sup>3</sup> JCUS-SEP 77, p. 82.

<sup>4</sup> See JCUS-SEP 83, pp. 68-69 (reporting that a permanent, independent Sentencing Commission "would unnecessarily duplicate work currently performed by the Judicial Conference, the Federal Judicial Center and the Administrative Office of the United States Courts").

<sup>5</sup> There were more than 300 constitutional challenges to the establishment of the United States Sentencing Commission and the promulgation of the federal sentencing guidelines between 1987 and the Supreme Court's

guidelines were upheld in *Mistretta v. United States*, however, the Judicial Conference accepted their validity. In 1990, for example, the Judicial Conference voted to take no action on several proposals to seek fundamental reconsideration of the guidelines system.<sup>7</sup>

Individual judges came to accept the legitimacy of the guidelines system, as well.<sup>8</sup> Between 1991 and the Supreme Court's 2005 decision in *United States v. Booker*,<sup>9</sup> between 81.3% and 92.5% of federal sentences were either within guidelines ranges or reflected substantial assistance departures made upon the motion of the government; only 0.6% to 1.7% of sentences were above guidelines ranges; and only 5.8% to 18.1% were below guidelines ranges for other reasons (including government-initiated downward departures for reasons other than substantial assistance, such as §5K3.1 early disposition programs).<sup>10</sup>

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1989 decision in *Mistretta v. United States*, 488 U.S. 361. United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System ii (1991).

<sup>6</sup> JCUS-SEP 87, pp. 54-55 (noting, *inter alia*, "the mixed reaction of judges to the substance of the guidelines").

<sup>7</sup> JCUS-SEP 90, p. 71 (noting that the Conference took no action on Federal Courts Study Committee recommendations that included such wide-sweeping suggestions as "the guidelines issued pursuant to the Sentencing Reform Act not be treated as compulsory rules, but, rather, as general standards that identify the presumptive sentence" and "the Congress should reevaluate the process by which Commission-promulgated guidelines become law").

<sup>8</sup> See United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 95-96 (2004) (noting that a 1991 survey of federal judges indicated that judges were equally split in believing that the guidelines would increase disparity, decrease disparity, and would have no effect on disparity, while a 2001 survey indicated that more than 60% of judges believe that guidelines often (or almost always) reduce disparity).

<sup>9</sup> 543 U.S. 220 (2005).

<sup>10</sup> See United States Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* 32 fig.1 (2003); United States Sentencing Commission, *Annual Report* 42 (2002); United States Sentencing Commission, *Annual Report* 37 (2003); United States Sentencing Commission, *Annual Report* 49, 56 (2004); United States Sentencing Commission, *Annual Report* 39 (2005). The Sentencing Commission did not disaggregate downward departures initiated by the government for reasons other than substantial assistance from other downward departures until 2003. In 2003, 6.3% of sentences were government initiated for reasons other than substantial assistance; 7.5% of sentences reflected other downward departures. In 2004, government-sponsored downward departures eclipsed other downward departures. Before the Court's decision in *United States v. Blakely*, 542 U.S. 296 (2004), 6.4% of sentences were government initiated for reasons other than substantial assistance, while only 5.2% of sentences reflected other downward departures. After *Blakely*, the trend increased. In 2004, government-sponsored downward departures for reasons other than substantial assistance applied in 8.6% of sentences, while other downward departures were reflected in only 4.6%. In 2005, pre-*Booker*, government-sponsored downward departures for reasons other than substantial assistance applied in 9.4% of sentences, while other downward departures were reflected in only 4.3%.

Even after the Supreme Court's remedial opinion in *Booker* rendered the guidelines advisory, judges have continued to apply (and many have continued to follow) the guidelines.<sup>11</sup> Since *Booker*, approximately 85-86% of sentences have been within guidelines ranges or reflected downward departures made upon the government's motion.<sup>12</sup>

Despite concern by some that *Blakely* and *Booker* would fundamentally disrupt guideline sentencing,<sup>13</sup> within-guidelines sentences remain the rule – not the exception – in the federal courts.<sup>14</sup> The federal criminal justice system is still a system of sentencing guidelines. Indeed, the Supreme Court's decision in *Booker* explicitly states that district judges *must* calculate the guidelines and consider them when sentencing.<sup>15</sup>

Judges are affected by this obligation, obviously. But prosecutors and defense counsel think in terms of sentencing by the guidelines, as well. Although *Booker* opened sentencing to the full panoply of sentencing factors enumerated at 18 U.S.C. § 3553(a), old habits die hard. Many contemporary plea negotiations are still structured in terms of offense levels, criminal history, and viable departures. Only when a desired outcome appears elusive under the guidelines do federal practitioners reach for a "variance," appealing to the abstract principles of § 3553(a).

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<sup>11</sup> See United States Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing 46 (2006) ("The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent.").

<sup>12</sup> See United States Sentencing Commission, Annual Report 46 (2005); United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2006 (n.d.); United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2007 (n.d.) (all showing combined rates of within-guidelines and government-sponsored below range sentences between 85.4% and 86.4%).

<sup>13</sup> See, e.g., *Blakely*, 542 U.S. at 326 (Justice O'Connor, dissenting) ("What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."); Douglas Berman, *Supreme Court Cleanup in Aisle 4* (July 16, 2004) (available at: <http://slate.msn.com/id/2104014>) ("*Blakely* is the biggest criminal justice decision not just of this past term, not just of this decade, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court."); United States v. *Booker*: One Year Later—Chaos or Status Quo? Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 109<sup>th</sup> Cong., 109-121 (2006) (asking whether the Supreme Court's *Booker* decision required a legislative "fix").

<sup>14</sup> See United States Sentencing Commission, Preliminary Data Quarterly Report, Fourth Quarter Release 1 (2008) (indicating that 85.1% of sentences were within-guidelines or government-sponsored below range).

<sup>15</sup> *Booker* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). Of course, judges cannot abdicate their responsibility to assess the competing sentencing considerations in each individual case. The Supreme Court has been explicit in stating that judges may not treat the sentencing guidelines as presumptively reasonable. See, e.g., *Nelson v. United States*, 555 U.S. \_\_\_\_ (2009) (per curiam). The guidelines must be part of the judicial inquiry, but may not substitute for it.

United States probation officers also remain deeply enmeshed in the application of sentencing guidelines. In most districts, it is the probation officer who calculates the guidelines, and who incorporates the result into the sentencing recommendation of the presentence report. It is often the probation officer who completes the statement of reasons, the form designated by the Judicial Conference to record the judge's rationale for sentencing.<sup>16</sup> Indeed, the U.S. probation officer plays such a central role in guideline sentencing that they have been called "the guardians of the guidelines."<sup>17</sup>

There is a great deal about sentencing under the federal guidelines that is laudable. The last twenty years have demonstrated that sentencing guidelines have accomplished the "first and foremost"<sup>18</sup> goal of the SRA: reducing unwarranted sentencing disparity.<sup>19</sup> We have come a long way from the "judicial lawlessness" condemned by District Judge Marvin Frankel in 1972:

The scope of what we call "discretion" permits imprisonment from anything from a day to 1, 5, 10, 20 or more years. All would presumably join in denouncing a statute that said "the judge may impose any sentence he pleases." Given the morality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable.<sup>20</sup>

King and Klein note that horror stories about identical offenders before different judges, one who received a sentence of probation while the other was sentenced to imprisonment, were

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<sup>16</sup> See JCUS-SEP 03, p. 18 ("[T]he Conference designated the Statement of Reasons as the mechanism by which courts comply with the requirements of the PROTECT Act to report reasons for sentences to the United States Sentencing Commission.").

<sup>17</sup> Sharon Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 933 (1995).

<sup>18</sup> See Kenneth Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295 (1993); see also United States Sentencing Commission, *supra* note 8, at 79 ("Eliminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act.").

<sup>19</sup> See generally United States Sentencing Commission, *supra* note 8, at 93-99 (describing research suggesting that promulgation of sentencing guidelines, along with other changes made by the SRA, led to reduced inter-judge disparity).

<sup>20</sup> Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4 (1972). Of course, some suggest that the federal sentencing guidelines went too far. See Jon O. Newman, *Remembering Marvin Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT. REP. 319, 319 (2002) (arguing that the flexible guideline proposed by Frankel bears little resemblance to the "extraordinarily rigid, detailed, and cumbersome guideline system" at work in the federal system).

not the exception before promulgation of the guidelines, but the rule.<sup>21</sup> Appellate review was virtually non-existent.<sup>22</sup> This has changed under the guidelines.

The federal sentencing guidelines also accomplished several other goals of the SRA. They made federal sentencing significantly more rational,<sup>23</sup> more certain,<sup>24</sup> and more transparent.<sup>25</sup> The Sentencing Commission has suggested that sentencing now may be the most transparent part of the entire federal criminal justice system.<sup>26</sup> Because of the guidelines, punishment has become far more predictable. Now, confronted with an offense level of 21 and a criminal

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<sup>21</sup> Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT. REP. 316 (2004).

<sup>22</sup> See MICHAEL TONRY, SENTENCING MATTERS 6 (1996).

For all practical purposes, appellate review of sentences and parole release decisions was nonexistent. Judges' and corrections officials' decisions were supposed to be governed by the unique circumstances of particular cases. Without rules governing decisions whose correct application could be examined, there was little that appellate courts could review except gross abuses of discretion or allegations of corruption; no bodies of case law on sentencing or parole appeals could or did accumulate.

*Id.*, at 6.

<sup>23</sup> See United States Sentencing Commission, *supra* note 8, at 136.

Under the existing code, similar conduct can be charged in a variety of ways and there is no systematic grading of offenses to ensure punishment proportionate to the seriousness of the crime. The guidelines brought order to the code by assigning the plethora of statutory offenses to generic categories representing the basic classifications of criminal conduct. These generic offenses were then graded in terms of seriousness, and specific adjustments for aggravating and mitigating circumstances were provided to adjust for the facts of each particular case.

*Id.* (citations omitted).

<sup>24</sup> The "establishment of truth-in-sentencing through the elimination of parole" ... increased sentencing certainty "at a stroke." *Id.*, at 11. Real offense sentencing helps to sever the punishment imposed from the idiosyncratic manner in which an offense is charged. See *supra* note 23. While the Sentencing Commission did not settle on a pure real offense system when it promulgated the guidelines, it included a number of real offense elements. United States Sentencing Commission, Guidelines Manual 5-6 (2008).

<sup>25</sup> See *id.* at 80-81 (describing increased transparency and increased research focus on sentencing because of that transparency).

<sup>26</sup> *Id.* at 80 ("Sentencing may now be the most transparent part of the criminal justice system.").

history score of 2, a defendant knows that he is facing 46-57 months in prison,<sup>27</sup> and can make informed decisions about accepting responsibility, providing assistance to prosecutors, or accepting a plea bargain.

Despite these laudable achievements, the federal sentencing guidelines have been excoriated by many commentators.<sup>28</sup> Critics of the federal guidelines frequently complain that they are too complicated,<sup>29</sup> too rigid,<sup>30</sup> and too draconian.<sup>31</sup> Even Supreme Court Justice Anthony Kennedy has complained that our punishments are too severe and our current sentences are too long.<sup>32</sup> The severity of the guidelines is exacerbated by the Commission's efforts to reconcile the guidelines against congressionally-enacted mandatory minimum sentences.<sup>33</sup> Under the binding

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<sup>27</sup> See United States Sentencing Commission, *supra* note 24, at inner back cover (reproducing sentencing table).

<sup>28</sup> See, e.g., TONRY, *supra* note 22, at 11 ("Few outside the federal commission would disagree that the federal guidelines have been a disaster."); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Institute Policy Analysis No. 458, at 23 (2002) ("There are many possible paths to positive change, all leading to the dissolution of the commission and the repeal of its Guidelines."); José Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L. J., July 27, 1992, at 27 ("The sentencing guidelines system is a failure—a dismal failure, a fact well known and fully understood who is associated with the federal judicial system.").

<sup>29</sup> See, e.g., TONRY, *supra* note 22, at 98 ("One of the commission's worst blunders was promulgation of the forty-three level sentencing grid. By being so large and giving an appearance of arbitrary sentencing by numbers, it became one of the guidelines' worst enemies."). The guidelines manual (used to interpret the grid) is more than 500 pages long. "To many, the Guidelines make the federal tax code look like *Reader's Digest*." Luna, *supra* note 28, at 12.

<sup>30</sup> See, e.g., Luna, *supra* note 28, at 13-15 (criticizing the narrow ranges of the guidelines and the commission's general exclusion of "seemingly relevant" sentencing factors from consideration).

<sup>31</sup> See, e.g., Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299 (2000).

[T]he narcotics sentences generated by the Guidelines and the various minimum mandatory statutory sentencing provisions are often, if not always, too high. I say this as a former prosecutor of some fourteen years experience, seven of them as an Assistant U.S. Attorney in Miami, who helped send a fair number of folks to prison for narcotics offenses.

*Id.* at 337.

<sup>32</sup> See, e.g., Stephen A. Saltzburg & James R. Thompson, Message from the Co-Chairs, in *SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 3* (American Bar Association, Commission on Effective Criminal Sanctions 2007) (quoting Justice Anthony Kennedy as stating, "Our resources are misspent, our punishments too severe, our sentences too long.").

<sup>33</sup> See TONRY, *supra* note 22, at 78-79.

federal guidelines, pre-*Booker*, it was said that judges had been transformed into automatons, into calculators,<sup>34</sup> compelled to enforce a system in which they did not believe. When judges did dare to deviate from the guidelines, they were overturned on appeal,<sup>35</sup> or worse.<sup>36</sup>

I do not wish to join this litany of criticism. Nor do I wish to prescribe specific recommendations to improve the implementation of the SRA. Many others – both individuals and organizations – have already done so.<sup>37</sup> At the time of *Blakely*, dozens of academics and advocacy groups published thoughtful recommendations for sentencing reform.<sup>38</sup> The Judicial Conference, the policy making body for the federal judiciary, regularly articulates its views on behalf of the courts and the probation and pretrial services system.<sup>39</sup> More recently, in anticipation of a new

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The U.S. Congress has enacted many mandatory penalty laws since 1980 and the commission had to decide how to reconcile the guidelines with laws calling for two-, five-, ten-, or twenty-year minimum sentences. ... [The commission decided to] increase all drug-offense sentences across the board so that the guidelines sentences and the statutory minima for mandatory-penalty offenses would be the same. ... [This] in effect lifts the entire [sentencing grid] lattice and increases severity overall.

*Id.* at 79.

<sup>34</sup> See Bert Brandenburg & Amy Kay, Courts...or Calculators? The Role of Courts in Criminal Sentencing, Justice at Stake Issue Brief, at: <http://www.gavelgrab.org/wp-content/resources/Courts%20or%20Calculators.pdf> (describing consequences of limited judicial discretion in sentencing).

<sup>35</sup> See 18 U.S.C. § 3742(a) and (b) (articulating bases for appeal of sentence).

<sup>36</sup> See, e.g., David Rubinstein, *Rosenbaum Inquisition*, THE NATION, Dec. 11, 2003, at: <http://www.thenation.com/doc/20031229/rubenstein> (describing legislative attempts to intimidate Judge James Rosenbaum from downward departures in federal sentencing).

<sup>37</sup> See, e.g., Justice Kennedy Commission, Reports with Recommendations (Aug. 2004), at: [http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports\\_Final\\_081104.pdf](http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf) (recommending, *inter alia*, changes to the federal sentencing guidelines to improve the criminal justice system); The Constitution Project, Recommendations for Federal Criminal Sentencing in a Post-*Booker* World (2006), at: <http://www.constitutionproject.org/pdf/SentencingRecs-Final1.pdf> (proposing a simplified and improved guideline sentencing system).

<sup>38</sup> See, e.g., Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004) (noting “Bowman fix” solution to the problem presented by *Blakely*, but arguing against it); James Felman, Legislative Solutions to *Blakely* (Sept. 16, 2004), at: [http://www.ussc.gov/hearings/11\\_16\\_04/felman.pdf](http://www.ussc.gov/hearings/11_16_04/felman.pdf) (arguing for simplified and codified guidelines); Paul Rosenzweig, Sentencing in a Post-*Booker* and *Fanfan* World (Dec. 17, 2004), at: <http://www.heritage.org/research/legalissues/tst111704a.cfm> (arguing for simplified guidelines).

<sup>39</sup> See, e.g., United States v. Booker: One Year Later—Chaos or Status Quo? Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 109<sup>th</sup> Cong., 109-121 (2006) (statement of Judge Paul G. Cassell, Chair of the Criminal Law Committee of the Judicial Conference) (outlining numerous steps

presidential administration, a second volley of criminal justice recommendations has appeared in policy-making circles.<sup>40</sup> Many of those making recommendations have identified the same problems and have suggested similar solutions (e.g., guideline simplification or repeal of some/all mandatory minimum penalties). Accordingly, I encourage the Sentencing Commission to consider the extant body of policy proposals – not just the testimony submitted for its own regional hearings – when assessing the implementation of the SRA.

Instead of criticizing or enumerating desirable amendments to the guidelines, I want to focus the Commission's attention on the importance of data and research. Because the guidelines are now advisory,<sup>41</sup> and because the guidelines cannot be treated as presumptively reasonable,<sup>42</sup> the guidelines themselves are less important than they were pre-*Booker*. Gone are the days when a district judge would be summarily reversed for departing below the guidelines by giving weight to a disfavored factor; today it is the district judge who sentences within the guidelines, without explaining why, who is likely to be reversed.<sup>43</sup> For this reason, the data collected by the Sentencing Commission may be equally important – or more important – than the guidelines it promulgates.

Sentencing data and data integrity are perhaps more important now than they have ever been. Given President Obama's announcement that "[t]he question we ask today is not whether our

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that Congress could take to improve federal sentencing); Mandatory Minimum Sentencing Laws – The Issues, Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 110<sup>th</sup> Cong., 110-110 (2007) (statement of Judge Paul G. Cassell, Chair of the Criminal Law Committee of the Judicial Conference) (describing problems associated with mandatory minimum sentencing, expressing the Judicial Conference's longstanding opposition to mandatory sentencing, and identifying "alternatives to injustice"). The Judicial Conference has come a very long way since opposing the establishment of the Sentencing Commission and the guidelines. In March of 2005, it resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible." JCUS-MAR 05, p. 15.

<sup>40</sup> See, e.g., Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums* (Sept. 2008), at [http://www.famm.org/Repository/Files/8189\\_FAMM\\_BoggsAct\\_final.pdf](http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf) (advocating widespread repeal of mandatory minimum sentences); The Sentencing Project, *Smart on Crime: Recommendations for the Next Administration and Congress* (Nov. 5, 2008), at: [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_transition2009.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_transition2009.pdf) (outlining a number of problems in the criminal justice system and advancing corresponding solutions).

<sup>41</sup> See *United States v. Booker*, 543 U.S. 220 (2005) (rendering the guidelines advisory).

<sup>42</sup> See *Rita v. United States*, 551 U.S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the guidelines should apply."); *Gall v. United States*, 552 U.S. \_\_\_, \_\_\_ (slip. Op., at 11-12) (noting that district judges "may not presume that the Guidelines range is reasonable.").

<sup>43</sup> See, e.g., *Nelson v. United States*, 555 U.S. \_\_\_ (2009) (reversing sentencing court for applying a presumption of reasonableness).

government is too big or too small, but whether it works,”<sup>44</sup> the Commission (along with judges, prosecutors, defenders, and probation officers) must appreciate the significance that data may soon play in the setting of policy.

In 2004, the Criminal Law Committee of the Judicial Conference endorsed a strategic approach that the probation and pretrial services system be organized, staffed, and funded in ways to promote mission-critical outcomes; and that the capacity be developed to empirically measure the results.<sup>45</sup> Following up on this commitment to measurable results, the Criminal Law Committee has embraced the use of evidence-based practices in the supervision of defendants and offenders,<sup>46</sup> and in formulating its budget requests and in making programmatic decisions.<sup>47</sup>

To this end, the Office of Probation and Pretrial Services at the Administrative Office of the United States Courts has distributed grant funding to eighteen offices in sixteen districts to implement evidence-based supervision practices.<sup>48</sup> These districts have introduced programs such as risk/needs assessment,<sup>49</sup> motivational interviewing,<sup>50</sup> cognitive-behavioral techniques,<sup>51</sup> offender workforce development,<sup>52</sup> and reentry programs based on drug court

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<sup>44</sup> Barack Obama, Inaugural Address (Jan. 20, 2009), available at: <http://www.cnn.com/2009/POLITICS/01/20/obama.politics/index.html>.

<sup>45</sup> JCUS-SEP 04, p. 15.

<sup>46</sup> JCUS-SEP 06, p. 19.

<sup>47</sup> JCUS-SEP 07, p. 14

<sup>48</sup> See John M. Hughes. *Results-Based Management in Federal Probation and Pretrial Services*, FEDERAL PROBATION 12 n.10 (Sept. 2008) (identifying participating districts).

<sup>49</sup> See, e.g., Christopher T. Lowenkamp, et al., *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?* FEDERAL PROBATION 3-8 (Dec. 2006) (concluding that accurate identification of offender risk and need is important for effective non-custodial supervision, such as that conducted by federal probation and pretrial services officers); Scott VanBenschoten, *Risk/Needs Assessment: Is this the Best We Can Do?* FEDERAL PROBATION 38-42 (Sept. 2008) (calling for improvements upon existing risk/needs instruments).

<sup>50</sup> See, e.g., Michael D. Clark, *Motivational Interviewing for Probation Staff: Increasing the Readiness to Change*, FEDERAL PROBATION 22-28 (Dec. 2005) (suggesting that skillful use of motivational interviewing by probation officers can significantly increase the likelihood of long-term behavioral change among offenders); Melissa Alexander et al., *Motivational Interviewing Training in Criminal Justice: Development of a Model Plan*, FEDERAL PROBATION 61-66 (Sept. 2008) (identifying stages of motivational interviewing training and outlining a model implementation training plan for districts).

models.<sup>53</sup> Other districts within the probation and pretrial services system are employing these interventions, as well. While the impact of these interventions on federal recidivism data is not yet known, a cost-benefit analysis conducted by the Washington State Institute for Public Policy (WSIPP) suggests that a number of these initiatives not only reduce recidivism at the state and local level, but curb reoffending by such a margin that even more-expensive programs are sometimes cost effective.<sup>54</sup>

Type of Intervention	% reduction in Crime (# studies)	Benefit to victims	Benefit to public	Costs	Total (Benefits minus costs)
Intensive supervision: treatment-oriented programs	-16.7% (11)	\$9,318	\$9,369	\$7,124	\$11,563
Cognitive-behavioral therapy in prison or community	-6.3% (25)	\$5,658	\$4,746	\$105	\$10,299
Drug treatment in community	-9.3% (6)	\$5,133	\$5,495	\$574	\$10,054
Adult drug courts	-8.0% (57)	\$4,395	\$4,705	\$4,333	\$4,767
Employment and job training in the community	-4.3% (16)	\$2,373	\$2,386	\$400	\$4,359
Electronic monitoring to offset jail time	0% (9)	\$0	\$0	-\$870	\$870
Intensive supervision: surveillance-oriented programs	0% (23)	\$0	\$0	\$3,747	-\$3,747
Adult boot camps	0% (22)	\$0	\$0	n/e	n/e
Domestic violence education/cognitive-behavioral treatment	0% (9)	\$0	\$0	n/e	n/e
Life Skills education programs for adults	0% (4)	\$0	\$0	n/e	n/e

Thus, intensive treatment-oriented supervision programs cost \$7,124 more than alternative programs, but they reduce recidivism by 16.7% according to 11 different studies, and thereby save victims \$9,318 and save the taxpaying public \$9,369. The net effect is that programs of this kind appear to save a net \$11,563. Of course, other programs (such as surveillance-oriented intensive supervision) have no significant effect on recidivism and impose additional costs (the net totals for surveillance-oriented intensive supervision were not evaluated by WSIPP).

Although the Criminal Law Committee has not endorsed the WSIPP study or the correctional interventions evaluated therein, it *has* repeatedly endorsed the use of evidence-based

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<sup>51</sup> See, e.g., Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come from and What They Do*, FEDERAL PROBATION 43-49 (Sept. 2008) (outlining origins and applications of cognitive-behavioral therapy, and discussing its application to the federal probation and pretrial services system).

<sup>52</sup> See, e.g., Jack McDonough & William D. Burrell, *Offender Workforce Development: A New (and Better?) Approach to an Old Challenge*, FEDERAL PROBATION 71-76 (Sept. 2008) (discussing relationship between employment and recidivism, and describing efforts to establish a workforce development program).

<sup>53</sup> See C.A.R.E. Program Summary, at: [http://www.rashkind.com/alternatives/dir\\_09/Sorokin\\_CAREProgSummary.pdf](http://www.rashkind.com/alternatives/dir_09/Sorokin_CAREProgSummary.pdf) (describing District of Massachusetts program modeled on drug court principles); see also Daniel W. Close, et al., *The District of Oregon Re-Entry Court: Evaluation, Policy Recommendations, and Replication Strategies*, at <http://www.ord.uscourts.gov/ReentryCourtDoc.pdf> (providing evaluation of District of Oregon program).

<sup>54</sup> See Steve Aos, et al., *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, at: <http://www.nicic.org/Library/021948> (evaluating evidence-based criminal justice initiatives with a cost-benefit analysis).

practices.<sup>55</sup> Accordingly, probation and pretrial services officers across the country are trying to use social research to better supervise defendants and offenders. A national risk/needs tool is already in development, and will allow probation officers to tailor evidence-based interventions to the specific criminogenic risks and treatment needs of each individual offender. Having reliable data about sentencing and recidivism would enable judges to impose evidence-based sentences and would enable probation officers to implement those sentences in a way that maximizes their effectiveness.

Interestingly, many of the evidence-based initiatives being implemented by probation and pretrial services offices share common goals and methodologies with the initiatives explored by the Sentencing Commission at its 2008 Symposium on Alternatives to Incarceration.<sup>56</sup> As alternatives to incarceration are studied by the Sentencing Commission, the Executive Branch,<sup>57</sup> and the Congress, meaningful sentencing data will be essential to these efforts, as well.

I hope that the Sentencing Commission uses the twenty-fifth anniversary of the SRA to reflect on the sentencing guidelines and ways that they can be improved to guide judges after *Booker*, but I also hope that the Commission remains attentive to the essential role that data will play in the criminal justice system as government agencies look for interventions that work and that use resources in a thoughtful and effective manner.

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<sup>55</sup> See *supra* notes 45-47.

<sup>56</sup> See United States Sentencing Commission, Symposium on Alternatives to Incarceration, available at: [http://www.ussc.gov/SYMPO2008/NSATI\\_0.htm](http://www.ussc.gov/SYMPO2008/NSATI_0.htm) (providing materials distributed at July 14-15, 2008 symposium).

<sup>57</sup> See Blueprint for Change: Obama and Biden's Plan for America 65 (2008), at: <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf> (identifying reduction of recidivism by providing support to ex-offenders and expanded use of drug courts as key criminal justice goals).

*Thomas Bishop  
Chief Probation Officer  
Northern District of Georgia*

Mr. Bishop graduated in 1984 from Ashland University, in Ashland, Ohio, with a degree in Business Administration. Upon graduation, he became employed as a State Probation Officer in Waycross, Georgia. In 1988, Mr. Bishop was hired as a U.S. Probation Officer in the Northern District of Georgia where he assumed both supervision and presentence duties. In 2005, he was selected Chief U.S. Probation Officer.

Prior to becoming Chief, Mr. Bishop was an FJC Instructor and presented supervision related programs nationally. He also provided local training on guideline revocations, conducting searches, drug/alcohol treatment, and the Monograph 109. He was a member of his district's Search Team for 8 years, leading it the last 3 years.

Tom is a 1999 graduate of the FJC Leadership Development Program.

**THOMAS W. BISHOP  
CHIEF U.S. PROBATION OFFICER  
NORTHERN DISTRICT OF GEORGIA  
TESTIMONY BEFORE U.S. SENTENCING COMMISSION  
FEBRUARY 10, 2009**

I am honored to be selected to participate in the regional hearings in recognition of the 25<sup>th</sup> anniversary of the passage of the Sentencing Reform Act of 1984. In preparation of my participation on the panel "View from the Probation Office," I spent considerable time interviewing officers responsible for interpreting and applying the guidelines. My testimony will provide an overview of their comments and suggestions regarding the guidelines and Booker. I will touch on the role of probation officers in light of Booker, and discuss some specific recommendations, which include:

- 1) Establishing policy which would require parties to provide probation officers prior notice of their intent to request a variance. This would allow officers time to verify information, related to a variance, prior to sentencing.
- 2) A recommendation which involves the lowering of penalties involving cocaine and crack and a recommendation to Congress to consider reducing the drug mandatory minimums.
- 3) A recommendation to increase the penalties involving fraud related offenses. I will speak of the increase of this activity in our community and the damage it is causing not only locally, but nationally.
- 4) I will close by discussing the American Bar Association's recommendation to amend Rule 32 of the Federal of the Federal Rules of Criminal Procedure. The amendment, which we oppose, would require officers to provide copies of all documents received during the course of an investigation to opposing parties. The same amendment would require probation officers to provide a written summary of all oral information received during the course of an investigation to all parties.

Thank you for the opportunity to share a "View from the Probation Office."





**UNITED STATES SENTENCING COMMISSION  
ATLANTA, GA  
FEBRUARY 10-11, 2009  
PUBLIC HEARING**

**Panel Three**  
**VIEW FROM SENTENCING PRACTITIONERS**



PUBLIC HEARING  
FEBRUARY 10, 2009  
ATLANTA, GEORGIA

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**IV. View from Sentencing Practitioners**

**1:30 p.m. - 3:00 p.m.**

*Nicole Kaplan  
Assistant Federal Public Defender  
Northern District of Georgia*

*Lyle Yurko  
Charlotte, NC*

*David O. Markus  
Criminal Justice Act Panelist, District Representative  
Southern District of Florida*

*Alan DuBois  
Senior Appellate Attorney  
Federal Public Defender  
Eastern District of North Carolina*

*Amy Levin Weil  
Atlanta, GA*

*Nicole Kaplan*  
*Assistant Federal Public Defender*  
*N.D. Ga.*

Nicole M. Kaplan is an Assistant Federal Public Defender in the Northern District of Georgia. Ms. Kaplan is a frequent presenter at CLE programs for indigent defense lawyers practicing in federal court. She is a former law clerk to the Honorable Stanley F. Birch on the United States Court of Appeals for the Eleventh Circuit and the Honorable C. Christopher Hagy, Magistrate Judge for the Northern District of Georgia. Ms. Kaplan obtained her juris doctor *cum laude* from Georgetown University Law Center and her Bachelor of Arts with honors from Goucher College.

**Testimony of**  
**Alan Dubois**  
**Senior Appellate Attorney, Eastern District of North Carolina**  
**and**  
**Nicole Kaplan**  
**Staff Attorney, Northern District of Georgia**

**Before the**  
**United States Sentencing Commission**

**Public Hearing on “The Sentencing Reform Act of 1984: 25 Years Later”**  
**Atlanta, Georgia**  
**February 10, 2009**

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We thank the Commission for holding this hearing and for inviting us to testify regarding how the federal sentencing system is working twenty-five years after the Sentencing Reform Act was enacted, and what changes should be made to improve it.

***I. The Sentencing Reform Act of 1984 Held Enormous Promise.***

The vision of sentencing reform was that the Guideline system would fairly, efficiently and effectively satisfy all of the purposes of sentencing. The guidelines would allow individualized sentences and would avoid unwarranted disparities. Sentencing would be more transparent and predictable. The guidelines would encourage the use of effective non-prison alternatives particularly for non-violent first offenders, and the guidelines would be formulated to minimize prison overcrowding. The Commission would continually measure whether these goals were being met, and would revise the guidelines and policy statements if they were not. This continuing evolution would be based on judicial sentencing decisions, consultation with experts and all stakeholders in the criminal justice system, empirical research, and developing knowledge of human behavior.<sup>1</sup>

Judges were to play an essential role in the guidelines’ continuing evolution: “[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures,” the “courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons,” and “the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.”<sup>2</sup> The Commission would not “second-guess[] individual judicial sentencing actions either at the trial or appellate level,” but instead would learn “whether the guidelines are being effectively implemented and revise

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<sup>1</sup> 28 U.S.C. §§ 991(b), 994(f), 994(g), 994(m), 994(o), 995(a)(12)-(16).

<sup>2</sup> *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, J.).

them if for some reason they fail to achieve their purposes.”<sup>3</sup> In this way, the Guideline system would “reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation.”<sup>4</sup>

## **II. That Promise Was Not Fulfilled.**

Judicial feedback was suppressed by the Commission’s many prohibitions and restrictions on acceptable grounds for departure, the near complete limitation on departures to those allowed by the Commission, and overbearing appellate review. Judges were forbidden from considering whether the guidelines accomplished sentencing purposes, avoided unwarranted disparities, or appropriately took account of individual circumstances, and were required to impose sentences they believed were unfair and ineffective.<sup>5</sup>

Instead of evolving through a dialogue between judges and the Commission, consultation with all stakeholders, and expert research, the guidelines were overwhelmingly driven by the wishes of the Department of Justice (DOJ) and its allies in Congress.<sup>6</sup> DOJ actively lobbied the Commission and Congress for lengthier sentences on the theory that heavy penalties were needed to coerce cooperation and guilty pleas,<sup>7</sup> or

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<sup>3</sup> S. Rep. No. 98-225 at 178 (1983).

<sup>4</sup> *Id.*

<sup>5</sup> See *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) (“To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines.”); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) (“Disproportionality does not, in itself, provide an appropriate basis for a downward departure.”); *United States v. Goff*, 20 F.3d 918, 922 (8th Cir. 1994) (Heaney, J., dissenting) (by rejecting district court’s reliance on defendant’s family ties and responsibilities, majority “pull[s] another plank from beneath district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant’s life will be frustrated by this court.”).

<sup>6</sup> “In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission.” USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at xvii (Nov. 2004) (hereinafter “Fifteen Year Review”). “To date the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that are also mentioned in the SRA.” *Id.* at 77.

<sup>7</sup> See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (Feb. 2005) (“prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power,” and listing numerous examples of the Department requesting more stringent sentencing laws and guidelines because it would make prosecutors’ jobs easier).

to sufficiently motivate prosecutors.<sup>8</sup> Congress, to express disapproval of crimes in the news, enacted mandatory minimums, increased statutory maximums, and issued directives to the Commission. Thus, the guidelines for the vast majority of defendants sentenced in federal court were based on congressional actions, guideline amendments initiated by DOJ, and concerns about what would be acceptable to DOJ and its advocates in Congress.<sup>9</sup> Guideline sentences thus became increasingly severe, but failed to reflect the purposes of sentencing.<sup>10</sup> Rather than minimizing the likelihood of prison overcrowding, the guidelines contributed, at a much greater rate than the states, to the problem of over-incarceration today.<sup>11</sup> The United States has the highest rate of

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<sup>8</sup> For example, DOJ claimed that the prospect of a sentence without imprisonment was insufficient to motivate AUSAs to bring intellectual property cases. In support of a “trafficking” enhancement in § 2K2.1 based on two firearms, DOJ argued that firearms “traffickers” traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to “merit” the expenditure of resources to prosecute them.

<sup>9</sup> See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005); Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999).

<sup>10</sup> In 1999, Commission staff reported that average time served had doubled since the guidelines’ inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

<sup>11</sup> See Barkow, *supra* note 7, at 766 (“Political pressures might explain [the fact that] the Commission did not make much of this provision [§ 994(g)] and developed guidelines with no concern for their effect on prison population.”); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol’y Rev. 93, 109 (1999) (“The Commission has never allowed considerations of existing prison capacities to limit decisions to lengthen sentences, and as a result federal prisons have been operating at over 150 percent capacity throughout the Guidelines era.”); Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the U.S.*, *Overcrowded Times*, Dec. 1999, at 1, 12 (in the first ten years of the guidelines’ existence, the federal incarceration rate increased 119 percent, a rate 25% greater than the average increase in the incarceration rate in the nation as a whole); Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, *Prison & Jail inmates at Midyear 2004* at 2-4 & tables I-2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf> (between 1995 and 2004, the federal prison population increased annually by an average of 7.8% while the states added 2.7% inmates per year). By 2002, the guidelines alone (independent of mandatory minimum laws) accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession, see *Fifteen Year Review* at 53-54, 64, 67, 139, and “[m]any offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums.” *Id.* at 138.

imprisonment in the world,<sup>12</sup> the Bureau of Prisons is the largest prison system in the nation,<sup>13</sup> and it is filled with non-violent first offenders.

Despite its façade of precision and equal treatment, the mandatory guideline system created, and hid, massive unwarranted disparities and unwarranted uniformity. The guidelines themselves incorporate unwarranted disparity, including racial disparity.<sup>14</sup> Neutral judges were nonetheless required to follow them, and to treat offenders with widely varying culpability, risks of recidivism, dangerousness, and need for treatment or training all the same.<sup>15</sup> Partisan prosecutors, however, were given “indecent power” over sentencing through their ability to threaten punishment to the full extent of the “applicable” guideline range,<sup>16</sup> including uncharged and even acquitted conduct, based on information that may or may not be reliable, and guideline interpretations that may or may not be “correct” or consistent among cases.<sup>17</sup> Prosecutors determined precisely what the sentence would be, through charge bargaining, fact bargaining, downward departure motions in their sole discretion, and even manipulation of the type or quantity of drug for which the defendant would be sentenced.<sup>18</sup> This created unwarranted disparity.<sup>19</sup>

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<sup>12</sup> International Centre for Prison Studies, King’s College London, World Prison List (seventh edition)(January 2007) available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf> (last viewed Dec 10, 2008).

<sup>13</sup> See Bureau of Justice Statistics, *Prisoners in 2007* (December, 2008). The federal prison population is now four and half times what it was when the SRA was enacted. It was 44,408 in 1986, 48,300 in 1987, see Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988*, tbl. 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989, and is 201,280 today. See <http://www.bop.gov/news/quick.jsp#1>. It has increased at least three times the rate of state prisons since 1995, Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_federalprisonpop.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf), is 37% overcapacity. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>, and costs the taxpayers over \$5 billion per year, *Costs of Incarceration and Supervised Release* (\$24,922 per inmate in FY 2007), available at <http://www.uscourts.gov/newsroom/2008/costs.cfm>.

<sup>14</sup> Fifteen Year Review at 116-17, 133-35.

<sup>15</sup> See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992).

<sup>16</sup> “[T]he decades-long enterprise provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors’ ability to threaten full application of the severe Sentencing Guidelines.” Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (May 2008).

<sup>17</sup> Fifteen Year Review at 50, 87.

<sup>18</sup> See Fifteen Year Review at 50, 86, 92; Constitution Project’s Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 33 (June 7, 2005); Federal Courts Study

Further, because the guidelines are so complicated and time-consuming, probation officers became dependent on prosecutors and agents for the “facts,” and applied the guideline rules in different ways from case to case.<sup>20</sup> Nonetheless, judicial compliance with the guideline sentence or the sentence advocated by the prosecutor was said to constitute “uniformity.”

### **III. The Supreme Court’s Modification of the Sentencing Reform Act Once Again Holds Enormous Promise.**

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Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) (“We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system.”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may adversely impact blacks and interfere with the Commission’s mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the Guidelines through plea bargaining, while not “necessarily bad,” is “hidden and unsystematic,” suggests “significant divergence from the statutory purpose” of the Guidelines, and “occurs in a context that forecloses oversight and obscures accountability”).

<sup>19</sup> Frank Bowman et al., *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 Fed. Sent. Rep. 165, 170 (2003); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wisc. L. Rev. 187 (1993); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 So. Methodist U. Dedman School of Law 211 (2004); USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998); USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

<sup>20</sup> This can almost never be exposed. However, in one case, two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant. See *United States v. Quinn*, 472 F. Supp. 2d 104 (D. Mass. 2007). The judge found: “The possibility of inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines’ manner of addressing ‘relevant conduct.’ Moreover, because the ‘relevant conduct’ inquiry is adjunct rather than central to the question of criminal culpability, it is possible that it will be pursued by different investigators with different levels of vigor and thoroughness. In other words, the Guidelines are susceptible to the possibility that the effect of ‘relevant conduct’ on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant’s past illegal activities. . . . The essential scandal of the anomaly as it works in this case is that it directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.” *Id.* at 111.

As the remedy for the Sixth Amendment violation embodied in the mandatory guidelines, the Supreme Court gave judges the power to impose fair and effective sentences in individual cases, to reject guidelines that are not based on empirical data and national experience, and to serve their function in the constructive evolution of responsible guidelines. See *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The ability of judges to openly disagree with the guideline sentence based on policy considerations even in a factually ordinary case is necessary to avoid a Sixth Amendment violation. See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007). It also gives the Commission the feedback it needs to revise the guidelines. Judges are now providing the Commission with valuable feedback, in the form of data and sentencing opinions, on a wide variety of guidelines.<sup>21</sup> The courts of appeals are upholding this approach.<sup>22</sup> To the extent a few have continued to enforce *de facto* presumptive or mandatory guidelines, the Supreme Court has made clear that this must cease. See *Spears v. United States*, \_\_ S. Ct. \_\_, 2009 WL 129044 (Jan. 21, 2009); *Nelson v. United States*, \_\_ S. Ct. \_\_, 2009 WL 160585 (Jan. 26, 2009).

The system promises to be much healthier. Judges must attend to sentencing purposes in every case, considering all relevant offense and offender characteristics in determining what sentence will fairly and effectively satisfy the purposes of sentencing. They can treat people differently as needed, and only as needed, depending on culpability, risk of recidivism, dangerousness, and rehabilitation needs. They can correct

<sup>21</sup> See, e.g., *United States v. Grober*, \_\_ F.Supp.2d \_\_, 2008 WL 5395768 (D. N.J. Dec. 22, 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M.D. Fla. Dec. 19, 2008); *United States v. Stern*, 2008 U.S. Dist. LEXIS 102071 (N.D. Ohio, Dec. 17, 2008); *United States v. Horn*, \_\_ F. Supp. 2d \_\_, 2008 WL \*7-9 (M.D. Tenn. Dec. 16, 2008); *United States v. Johnson*, \_\_ F.Supp.2d \_\_, 2008 WL 5115047 (S.D. Iowa Dec. 4, 2008); *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295, 2008 WL 3411819 (D. Colo. Aug. 13, 2008); *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008).

<sup>22</sup> See, e.g., *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *United States v. Vanvliet*, 542 F.3d 259 (1<sup>st</sup> Cir. 2008); *United States v. Liddell*, 543 F.3d 877 (7<sup>th</sup> Cir. 2008); *United States v. Tankersley*, 537 F.3d 1100 (9<sup>th</sup> Cir. 2008); *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1<sup>st</sup> Cir. 2008); *United States v. Rodriguez*, 527 F.3d 221 (1<sup>st</sup> Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1<sup>st</sup> Cir. 2008); *United States v. Smart*, 518 F.3d 800, 808-09 (10<sup>th</sup> Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9<sup>th</sup> Cir. 2008).

for excessive severity and unwarranted disparity inherent in a given guideline. Shifting sentencing power from prosecutors to judges brings with it great structural advantages, which promote transparency and reduce bias. Judges are no longer required to impose the sentence chosen by the prosecutor – often behind closed doors -- but may exercise neutral and informed discretion in open court. While the Commission’s own studies have found significant bias in prosecutorial decisions and policies,<sup>23</sup> there is no evidence that bias impacts the exercise of judicial discretion.<sup>24</sup>

Sentencing is now more transparent. Under the mandatory guidelines, judges, prosecutors and defense lawyers, alone or together, sometimes circumvented the guidelines in order to reach a sentence that was more just.<sup>25</sup> This kind of “institutionalized subterfuge” is no longer necessary. See *Spears, supra*, at \*3. The only lack of certainty is whether the guideline sentence, whatever it may be, will be imposed, as the parties are no longer precluded from demonstrating, or the judge from finding, that the guideline sentence is greater than necessary, or insufficient, to satisfy legitimate, congressionally mandated, sentencing purposes.<sup>26</sup>

The reasonableness standard of appellate review is far more sensible and constructive in placing sentencing firmly with the district court judge, who can best assess what sentence will be most fair and effective in satisfying the statutory purposes, and is in the best position to provide meaningful feedback to the Commission.

To the extent there has been any loss in “uniformity,” this means that more judges are using their power to impose more fair and effective sentences. The Commission can avoid excessive disparities through “ongoing revision of the Guidelines in response to sentencing practices.” See *Kimbrough*, 128 S. Ct. at 573-74; *Booker*, 543 U.S. at 263.

#### **IV. The Forces Are Now Aligned to Allow the Commission to Do its Job.**

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<sup>23</sup> Factors including race, gender, ethnicity and citizenship are “statistically significant in explaining §5K1.1 departures,” while factors such as the type or benefit of cooperation, defendant culpability and offense type “generally were found to be inadequate in explaining §5K1.1 departures.” USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998). “Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.” USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003).

<sup>24</sup> Fifteen Year Review at 125-27.

<sup>25</sup> *Id.* at 32, 82, 87, 141-42.

<sup>26</sup> For many reasons, the mandatory guideline system did not provide certainty, including the complexity and ambiguity of many of the guideline rules, the lack of evidentiary reliability, and uneven practices by prosecutors and probation officers.

The Supreme Court has now given the Commission the opportunity to fulfill the promise of the SRA. The Court repeatedly recognized the Commission's capacity to base the guidelines on careful study, research and consultation, and invited the Commission to cooperate with the courts in exercising that characteristic institutional role:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

*Rita*, 127 S. Ct. at 2464.

The leadership in Congress is sending the same message. The Chair of the House Subcommittee on Crime, Terrorism and Homeland Security believes that "*Booker* is the fix,"<sup>27</sup> recognizes that Congress is largely to blame for the broken system,<sup>28</sup> and has urged the Commission to now fulfill the mandates of the SRA that it could not fulfill before:

With a congress that is inclined to trust the Commission and not so inclined to tamper with the guidelines, this may be a good time for the Commission to take a look at them relative to how far off track they may be with respect to the original Sentencing Reform Act principles and recommend appropriate adjustments. As the Supreme Court pointed out in *Kimbrough vs. U.S.*, not all guidelines are based on empirical evidence. While many are, many are based on congressional directives and mandatory minimum statutes. This distinction is important. . . . The Sentencing Commission has the authority and is best equipped to take a long hard look at whether these "congressionally-driven" guidelines are appropriate. I encourage it to do so and to report its results to Congress, just as it did for the drug quantity and crack cocaine guidelines.<sup>29</sup>

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<sup>27</sup> *Plenary Speech by Mr. Robert C. "Bobby" Scott* at 11, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section, October 24, 2008.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* at 12-13.

The Judicial Conference has taken the same position, urging the Commission to assess and adjust the guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums. Mandatory minimums “interfere with the operation of the Sentencing Reform Act,” and “may, in fact, create unwarranted sentencing disparity.” Thus, guidelines that are based on mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply, and the Commission is therefore “obligated to make an independent assessment of what the appropriate sentence should be.”<sup>30</sup>

While the policies of the new DOJ have not yet been announced, President Obama has pledged to completely eliminate the disparity in sentencing between crack and powder cocaine offenders, and to give first-time non-violent offenders a chance to serve their sentences in drug rehabilitation programs that are more effective than prison.<sup>31</sup>

In 2007, the Commission, after exposing the disparity in sentencing between crack and powder cocaine offenders for over a decade, took the first step toward eliminating it. In 2008, the Commission held a symposium on alternatives to incarceration. The Commission has published a number of useful research reports, including the Report on Federal Escape Offenses, upon which the Court relied in *Chambers v. United States*, 129 S. Ct. 687 (2009).

There is broad consensus that the level of over-incarceration is a national disgrace, and that the SRA’s goals of fair, effective and efficient punishment should now be pursued. The Commission can now substantially reduce the guidelines’ recommended punishments to a level that is truly sufficient but not greater than necessary.

#### *V. How the Commission Can Make Sentencing Reform Work .*

The Commission should embrace the policy procedures and mandates of the SRA and re-affirm its role as an independent expert agency in the judicial branch.

##### *A. Review and Revise All Congressionally Driven Guidelines and Seek Overarching Directives to Implement 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(g).*

The Commission should proceed quickly with Mr. Scott’s invitation to exercise its expert capacity by taking “a long hard look at whether these ‘congressionally-driven’ guidelines are appropriate.” These are the major culprits in the unwarranted severity, unwarranted disparity, and over-incarceration caused by the guidelines, though the

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<sup>30</sup> See Comments of the Criminal Law Committee of the Judicial Conference 3, 4, 5 (March 16, 2007), [http://www.ussc.gov/hearings/03\\_20\\_07/walton-testimony.pdf](http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf).

<sup>31</sup> See [http://www.whitehouse.gov/agenda/civil\\_rights/](http://www.whitehouse.gov/agenda/civil_rights/).

Commission has often gone further than Congress required.<sup>32</sup> Reporting the results to Congress, however, is not enough. The guidelines must actually be revised if the goal of a fair, efficient and effective system is to be achieved. The Commission should therefore seek legislation along these lines:

Notwithstanding any other provision of law, the United States Sentencing Commission shall review and revise as necessary the federal sentencing guidelines to assure that they comply with the purposes set forth at 18 U.S.C. 3553(a) in as fair and effective a manner as possible.

It also seems that political influences are responsible for the fact that the Commission has not carried out the directive in the SRA to minimize prison overcrowding.<sup>33</sup> To underscore Congress's commitment to allow and encourage the Commission to act independently to reduce severity, the Commission should seek or support revision of the last sentence of 28 U.S.C. § 994(g) along the following lines:

The sentencing guidelines shall be revised to reduce the Federal prison population to its rated capacity in [three to five years] and maintain the population at or below this capacity at all times in the future.

***B. Reduce Unwarranted Disparity By Reducing Unwarranted Severity.***

The sentences recommended by many of the guidelines are too severe, including those for relevant conduct, drugs, immigration, child pornography, fraud, firearms, and career offenders.

Yet the national statistics on below-guideline sentences have not changed much in the four years since *Booker* was decided. The rate of judicial sentencing below the guideline range is still only about 13%, about half that of the government's 25.4% rate.<sup>34</sup> At first blush, these statistics present a dismal picture of sentencing reform. Prosecutors continue to take advantage of guideline severity to extract cooperation and quickly move cases. Prosecutors are also more likely to exercise their discretion based on legally irrelevant factors. Judges, however, who are the best source of transparent feedback to improve the guidelines, often remain wedded to them.

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<sup>32</sup> In addition to keying the drug guidelines at all quantity levels to the two mandatory minimum levels, the Commission has often reacted to legislation by increasing punishment in ways that Congress did not require. See Congressional Directives to Sentencing Commission, 1988-2008, [http://www.fdo.org/pdf/lib/SRC\\_Directives\\_Table\\_Nov\\_2008.pdf](http://www.fdo.org/pdf/lib/SRC_Directives_Table_Nov_2008.pdf).

<sup>33</sup> See Barkow, *supra* note 7, at 766 ("Political pressures might explain [the fact that] the Commission did not make much of this provision [28 U.S.C. § 994(g)] and developed guidelines with no concern for their effect on prison population.")

<sup>34</sup> USSC, *Preliminary Quarterly Data Report, 4<sup>th</sup> Quarter Release*, Fiscal Year 2008, Table 1.

The picture is not quite as dismal as it seems. On a national level, the below-guideline rate for judges, the government, or both is much higher than average in cases in which the guidelines are too severe, as shown in the table in the footnote.<sup>35</sup> While judicial feedback is more transparent and unbiased, a high rate for the government indicates that prosecutors believe the guideline sentence is more severe than strictly necessary (other than to serve its cooperation and case management purposes), and obviates the need for judges to sentence below the guideline range in more cases.

The problem is that only some defendants, and not others, get relief from guideline sentences that are too harsh. In both of our districts, for example, the number of illegal re-entry cases is growing but there is no authorized fast track program for illegal re-entry cases. The law of our circuits, unlike some other circuits, prohibits judges from varying based on fast track disparity. In the Northern District of Georgia, defendants are held pretrial by the marshals in a private contract facility where prisoners in transit to and from other districts are also housed, so they know what sentences are being imposed elsewhere. Our clients know, when they are being sentenced, that they are receiving higher sentences than their counterparts in other districts. This is impossible to explain and does nothing to promote respect for the law. The answer is for the Commission to reduce the severity of the illegal re-entry guideline, which is not, as it stands, based on empirical data and national experience.

Another problem is that some judges steadfastly refuse to follow *Booker* and its progeny in almost any case. In the Eastern District of North Carolina, the judicial rate of below-guideline sentences is only 6.9%.<sup>36</sup> Judges in this district continue to impose guideline sentences even in crack cases, despite the universal consensus among the Commission, the Supreme Court, the President, and the leadership in Congress that crack penalties are simply wrong.<sup>37</sup> *Spears* and *Nelson* may make a difference. The Commission could make a difference by encouraging judges to follow the law and provide the feedback it needs. Ultimately, the best solution is to reduce the severity of the guidelines.

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	Judicial	Government	Total
Drugs, § 2D1.1	13.8%	33.2%	47%
Immigration, § 2L1.2	8.9%	29.7%	38.6%
Fraud, § 2F1.1	23%	45%	68%
Child Pornography, § 2G2.2	37.3%	9.5%	46.8%
Firearms, § 2K2.1	17.6%	12.9%	30.5%

Source: USSC, *Preliminary Quarterly Data Report, 4<sup>th</sup> Quarter Release*, tbl. 4

<sup>36</sup> USSC, *Preliminary Quarterly Data Report, 4<sup>th</sup> Quarter Release*, tbl. 2.

<sup>37</sup> While this district does have an unusually high rate of above-guideline sentences at 7.8%, *id.*, the vast majority of these appear to come from one judge.

Courts are recognizing that the harshness of certain guidelines creates the wide disparities in sentences in cases involving those guidelines.<sup>38</sup> They are looking for sensible guidance from the Commission. As one judge explained:

[I]t is difficult for a sentencing judge to place much stock in a guidelines range that does not provide realistic guidance. My search for more relevant guidance, therefore, had to proceed in other directions, although I would have much preferred a sensible guidelines range to give me some semblance of real guidance.<sup>39</sup>

“Uniformity” for its own sake -- by forcing courts to follow the guidelines -- was never a good idea and is no longer an option. Instead, the Commission, as contemplated by the SRA and recognized by the Supreme Court, “can help to avoid excessive disparities” through “ongoing revision of the Guidelines in response to sentencing practices.” *Kimbrough*, 128 S. Ct. at 574; *Booker*, 543 U.S. at 264.

**C. Encourage Judges to Follow § 3553(a).**

The Commission should encourage judges to exercise informed discretion, not only because that is what the Supreme Court’s decisions require, but because that is the mechanism through which the Commission can learn which guidelines are unfair or ineffective, and revise them accordingly. Too many judges cling to the view, formerly championed by the government, that the guidelines are presumed reasonable at sentencing and may not be disagreed with on policy grounds. The Commission should take leadership to dispel these notions.

**1. Guidelines Manual.** The Commission should revise the Guidelines Manual to fully and accurately describe the sentencing procedures and standards set forth in the sentencing statute and the Supreme Court’s cases. The Manual is peppered with references to the now-excised § 3553(b). It continues to prohibit or discourage consideration of a host of factors that judges must consider under § 3553(a)(1). The new commentary entitled “Continuing Evolution and Role of the Guidelines,” suggests that the guidelines and departure policy statements have special weight in sentencing, and fails to mention at all that judges must be permitted to disagree with the guidelines based solely on policy considerations. As such, it is inaccurate and misleading and likely to discourage judges from following the law and participating in the evolution of the guidelines. The substantial problems with this commentary and our suggested solutions are detailed in the Appendix, Part I.

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<sup>38</sup> See, e.g., *United States v. Stern*, \_\_ F. Supp. 2d \_\_, 2008 WL 5273714 (N.D. Ohio Dec. 19, 2008); *United States v. Grober*, \_\_ F. Supp. 2d \_\_, 2008 WL 5395768 \*\* 14-16 (D. N. J. Dec. 22, 2008).

<sup>39</sup> *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) (Block, J.).

2. ***District Trainings.*** The Commission should emphasize in its trainings that the Commission welcomes and encourages feedback on the guidelines, whether positive or negative. All judges should understand that this is a vital part of their role in the new system. The Commission should include judges, probation officers, defense counsel and prosecutors together in its trainings. This would make it possible to have a transparent dialogue that would foster understanding through open debate.

3. ***Pre-Sentence Report.*** The Commission should encourage revision of the pre-sentence report to reflect U.S. Probation's Monograph 107. The Monograph sets forth § 3553(a) in its entirety, then states that "[a]ny sentence recommended must be 'sufficient, but not greater than necessary, to comply with' the statutory sentencing purposes," then lists a variety of questions to consider in relation to each sentencing purpose. See Publication 107 at II-70-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

4. ***Statement of Reasons Form.*** The Commission should advocate substantial revision of the Statement of Reasons form, and a requirement that either a transcript or written decision be attached.

First, the form suffers from the same problems as the new commentary in Chapter One of the Guidelines Manual. It gives great attention to the guidelines and departure policy statements ("the advisory guideline system"), says nothing about the parsimony clause, and treats the purposes of sentencing and the factors other than the guidelines and policy statements as an afterthought at best ("sentence outside the advisory guideline system"). The inescapable suggestion is that the guidelines and policy statements are presumptive and that the governing statute is suspect, which the Court has forbidden in *Rita*, *Gall* and once again in *Nelson*. The form has a section for explaining "the facts justifying a sentence outside the guideline system," but no section for explaining a policy disagreement with the guidelines. As the Supreme Court has repeatedly (in *Cunningham* and *Kimbrough*), and now adamantly (in *Spears*), made clear, judges must be permitted to vary from the guidelines based solely on a policy disagreements in the absence of any special "facts."

Second, the checkboxes, with bare citations to policy statements and subsections of § 3553(a), are inadequate as a means to collect or disseminate useful information, which may explain why the reasons the Commission reports are not meaningful. Judges should be required to attach either the transcript or a written decision, so that the Commission can study and disseminate real reasons. The checkboxes not only fail to capture meaningful reasons for the sentence, but they invite cursory treatment and therefore inaccuracy. We have come across numerous instances in which the reason checked on the form is not the reason upon which the judge relied.

D. ***Assist the Courts in Choosing the Appropriate Sentence, Within or Outside the Guideline Range.***

After *Booker* and its progeny, sentencing can be a cooperative endeavor. The Commission can promulgate and amend guidelines based on empirical research. Judges can give feedback to the Commission through their sentencing decisions that the Commission can use in its research. The Commission can collect, study, and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. Judges, in turn, can use that information in sentencing. The Commission can continually measure whether the purposes of sentencing are being met, and if not, it can revise the guidelines.

Judges must calculate and consider the guideline range but are required to impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing in light of all of the relevant facts of the case and the defendant's life. To inform their judgment, judges have relied on Commission research that is not reflected in the guidelines, other empirical and policy research, sentencing data, sentences in similar cases and dissimilar cases compiled by the judge or the parties, and judicial decisions in other cases.

**The Guidelines.** The Commission can assist judges in choosing the appropriate sentence, first, by revising the guidelines based on empirical data and national experience. The guidelines should give sensible and evidence-based advice,<sup>40</sup> and should provide reasons that invite judges to follow them. To that end, each guideline should explain what purpose or purposes it is intended to serve, how the guideline is intended to comply with 18 U.S.C. § 3553(a), and on what basis the Commission concluded that the guideline would be effective. The guidelines should also direct judges to the full range of sentencing options permitted by statute and explain in what circumstances different sentencing options are likely to serve the relevant purposes of sentencing.

**Research.** The Commission should continue to conduct and publish research on dangerousness and recidivism. Of all of the purposes of sentencing, the need to protect the public from further crimes of the defendant is the one of greatest practical concern, and also seems the most capable of being measured.

**Data.** The Commission should collect and disseminate data in a form that judges, probation officers, and the parties can use. One of the Commission's important missions is to systematically collect, study, and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. See 28 U.S.C. § 995(a)(12)-(16). Currently, the Commission publishes reasons that are too general to be meaningful (such as "criminal history issues," "general guideline adequacy issues," "circumstances not considered by

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<sup>40</sup> See Judge Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, Feb. 20, 2008 ("I suggest we re-brand our central concept and call it evidence-based sentencing, for that is what it is: sentences by judges who have considered the evidence that informs their discretion."), [http://www.brennancenter.org/content/pages/wolff\\_at\\_the\\_14th\\_annual\\_justice\\_brennan\\_lecture\\_on\\_state\\_courts\\_social\\_jus](http://www.brennancenter.org/content/pages/wolff_at_the_14th_annual_justice_brennan_lecture_on_state_courts_social_jus).

guidelines,” “18 U.S.C. § 3553(a)”); the number and rate of such reasons in all cases, but not by guideline or offense type, *see* USSC Sourcebook, tbls. 24-25B; the number of outside-guideline sentences by guideline, but without reasons, *id.* tbl. 28; and the median sentence and median decrease (or increase) by offense type but not the associated reasons. *See* USSC, *Preliminary Quarterly Data Report, 4<sup>th</sup> Quarter Release*, tbls. 5-15A. The Commission should report (1) the reasons for outside-guideline sentences in a more specific and meaningful way, (2) the number, rate and reasons for departures and variances for each offense guideline and for each offense type where the guideline covers different offense types, and (3) the average and median sentence length and decrease (or increase) associated with each reason.<sup>41</sup> Given the serious issues with the career offender guideline, the Commission should also publish the number of defendants sentenced under it, what their qualifying instant and prior convictions were, the mean and median sentence length, and the rate of and reasons for outside-guideline sentences.

**Sentencing Purposes.** The Commission should consider including in the Guidelines Manual something along the lines of U.S. Probation’s Monograph 107. As noted above, it sets forth § 3553(a) in its entirety, states that “[a]ny sentence recommended must be ‘sufficient, but not greater than necessary, to comply with’ the statutory sentencing purposes,” and suggests a variety of questions to consider in relation to each sentencing purpose. *See* Publication 107 at II-70-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

**E. Encourage the Use of Probation and Evidence-Based Alternatives.**

We thank the Commission for holding a symposium on alternatives to incarceration last summer so that the federal system could learn from the states how to reduce costs and protect the public through non-prison alternatives. Although the Commission’s proposed amendments and issues for comment for this cycle unfortunately do not include alternatives to incarceration, the Commission just issued a report which states:

Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.<sup>42</sup>

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<sup>41</sup> In *United States v. Cole*, 256 Fed. Appx. 510 (3d Cir. Nov. 29, 2007), the Third Circuit rejected the defendant’s argument that the district court erred by failing to consider average sentences for bribery in the nation or in the district because he did not explain how his case compared to that of the average bribery defendant in either jurisdiction.

<sup>42</sup> USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009).

At the same time, the report confirms that non-prison alternatives are not part of the culture of sentencing in federal court. While judges must now consider all of the kinds of sentences available by statute, here in the Northern District of Georgia, there has been only a small increase in split sentences and probation with home confinement for defendants who would not qualify under the guidelines' zone system, and no change in the Eastern District of North Carolina. For many of our clients who are non-violent first offenders, pretrial diversion or probation with drug treatment would be the appropriate sentence, but we have had very little success in convincing judges or probation officers to agree to this solution.

The reason for the under-use of probation appears to be that the Guidelines Manual does not direct attention to the "in/out" question, but rather directs it to the "how long" question reflected in the guidelines' zone system. This is unfortunate because Congress expected that the threshold question in most cases would be whether probation was sufficient or whether prison was required. Moreover, Congress expected that probation would be the presumptive sentence in "cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," that some term of imprisonment would be generally appropriate for "a person convicted of a crime of violence that results in serious bodily injury," and that between these poles, non-prison sentences would suffice in many cases.

In particular, Congress sought to guard against the use of incarceration to warehouse defendants who lacked the advantages of education, employment, and stabilizing ties, and intended that probation would be used to rehabilitate defendants who were poor, uneducated, and in need of education and vocational training, so long as prison was not necessary for some other purpose of sentencing. But, according to the Commission's data, the federal prison population consists overwhelmingly of people of color who are poor and uneducated, and whose crimes were not violent. With the exception of crack offenders (who are mostly African American and have a higher risk of arrest and prosecution than similarly situated Whites), drug offenders are usually first offenders. This is totally inconsistent with Congress's intent that probation would be used for offenders who are not dangerous or likely to commit a serious crime in the future, offenders who are in need of services, and first offenders.

Resources are being wasted on imprisoning people who do not need to be in prison. Many offenders would be much less likely to recidivate if those resources were spent on treatment, education, and job training instead of prison. As explained in more detail in the Appendix, Part II, we therefore propose that the Commission:

- Ensure that the first question is whether prison is appropriate at all, not how long the defendant should be imprisoned, by revising Chapter 5 to state at the beginning that probation is a sentence in and of itself, is permissible in every case in which prison is not statutorily required, and that the court should address at the outset in every case in which probation is statutorily allowed whether prison is actually necessary to satisfy any purpose set forth in § 3553(a)(1), (2) or (3).

- Provide evidence-based research on alternatives to incarceration in order to give guidance to judges, probation officers, and the parties.
- Expand the availability of alternatives to all offenders who are statutorily eligible without regard to the zone system.
- Amend Chapter Five to add a “first offender safety valve.”
- Amend Chapter Five to encourage specific alternative sanctions and programs that have been proven to decrease the risk of recidivism.
- Amend Chapter Seven to recognize and encourage a defendant’s participation in reentry programs.
- Recommend that the Bureau of Prisons revise its policies to address the problem of over-incarceration.

***F. Eliminate Policy Statements that Restrict Consideration of Characteristics of the Offender and Circumstances of the Offense.***

The Commission’s policy statements prohibiting, discouraging, limiting, and attempting to define a broad range of offender characteristics and certain offense characteristics are inconsistent with § 3553(a) and Supreme Court law. *See Gall v. United States*, 128 S. Ct. 586 (2007). Sentencing is needlessly complicated if the court feels compelled to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions. The rate of “departures” is shrinking as more courts recognize that imposing an appropriate sentence based on the purposes of sentencing in light of the characteristics of the offender and the circumstances of the offense is not only what they are required to do, but is more meaningful. Indeed, many of the factors which are deemed never or not ordinarily relevant are highly relevant in predicting reduced recidivism, demonstrating reduced culpability, or indicating a need for treatment or training in a non-prison setting. A more serious problem, however, is that some courts continue to believe that these restrictions take precedence over their duty to follow § 3553(a)(1).

As explained and set forth in more detail in the Appendix, Part III, the Commission should:

- Delete Chapter 5, Part H (Specific Offender Characteristics) and Part K.2 (Other Grounds for Departure) and move them to a historical note.
- Revise USSG § 1B1.4 to state that the court may not determine the kind or length of the defendant’s sentence “because of” race, sex, national origin, creed, religion or socioeconomic status.
- Retain encouraged “departures” in the Chapter 2 and Chapter 4 guidelines.
- Delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders.
- Revise USSG § 1B1.4 to clarify that the information to be used in imposing sentence applies to determination of “an appropriate sentence . . . within the applicable guideline range, or outside that range,” rather than “within the guideline range, or whether a departure from the guidelines is warranted.”

- Revise Application Note 1(E) to USSG § 1B1.1 to simplify it and bring it in line with current law and practice.

#### ***G. Simplify the Guidelines.***

There is a firm sense in our offices and in Defender offices across the country that the aggravating enhancements in the offense guidelines and the criminal history rules are much too complicated. There are too many of them, they are duplicative and cumulative, and the instructions are abstract and confusing. Judges, probation officers, and the parties are forced to focus on meaningless minutiae while the important questions are ignored. Judges are well-situated to determine whether an offense is particularly serious or not particularly serious based on the totality of the circumstances, without being required to add up points for every possible detail of the offense.<sup>43</sup>

By focusing on minutiae and cumulating discrete harms, many guidelines do exactly what the original Commission said they should not. “[T]he relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.” USSG § 1A1.1, Pt. 1(3), The Basic Approach, p.s. One of the rare exceptions to the guidelines’ general neglect of reduced personal culpability, role in the offense, is dwarfed by both the size of quantity-based aggravating factors and, particularly in fraud cases, the large number of cumulative and duplicative additional upward adjustments.

The complexity of the guidelines has a number of negative effects. First, it is often difficult to provide a client with a clear forecast of the guideline calculation, which is at least the “starting point” and is still the ending point in most cases. Second, there are too many traps for the unwary, particularly panel attorneys who do not deal with the guidelines on a constant basis. We commonly get calls from panel attorneys who do not properly take into account (or understand) potential cross-references, career offender enhancements or relevant conduct exposure. These attorneys often overestimate the value of pleas that dismiss particular counts, not realizing that it will all come back in as relevant conduct or be made irrelevant through some recidivist enhancement. Many attorneys have difficulty calculating criminal history.

Third, the complexity creates too much reliance by judges on probation officers. Judges in the Eastern District of North Carolina, for example, rely heavily on probation officers on the assumption that they are the only ones who can understand the arcane guideline rules. But the ability, time, and attention of probation officers are uneven at

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<sup>43</sup> Justice Breyer has **Error! Main Document Only.** criticized the “false precision” of the guidelines, and called upon the Commission to “act[] forcefully to diminish significantly the number of offense characteristics,” to “broaden[] the scope of certain offense characteristics, such as ‘role in the offense,’” and to move in the direction of “greater judicial discretion” in order to provide “fairness and equity in the individual case.” Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 \*10-11 (Jan./Feb. 1999).

best. Fourth, applying the guidelines takes too much time. This means that all other aspects of the sentencing decision are neglected. It makes errors more likely. And probation officers become dependent on summaries and reports from case agents because they do not have the time for independent analysis. Probation officers generally are given the same amount of time to write a report for a complicated fraud case as for an illegal re-entry or felon-in-possession case.

Fifth, the guidelines' complexity creates unwarranted disparity, as the original Commission recognized it would: "The greater the number of decisions required and the greater the complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." USSG § 1A1.1, Pt. 1(3), The Basic Approach, p.s.

Sixth, it appears that the guidelines' complexity is responsible for the government's insistence on appeal waivers. Because "the Department of Justice is concerned about the resources expended in guideline application, particularly the number of criminal appeals," the response "has been to reduce appellate caseloads by forcing defendants to waive their right to appeal in order to accept a plea bargain."<sup>44</sup> These waivers are not only unconscionable and unfair, but stunt the development of the law regarding guideline application and a broader common law of sentencing, and stifle feedback to the Commission.

The Commission should not approach simplification in a piecemeal fashion. Instead, it should conduct or review empirical studies to determine what aggravating offense circumstances actually correlate to one or more purposes of sentencing. If the Commission does that, we are confident that it will find that the complicated structure that has been erected does not correlate to the purposes of sentencing. One possible consequence of a truly empirical review would be a determination that the advisory guideline ranges should be broadened. This may require repeal of the "25% rule" in 28 U.S.C. § 994(b)(2). With simplified, advisory ranges, the rule may no longer be necessary.

#### ***H. Recommend Reliable and Fair Factfinding.***

**1. USSG § 6A1.3.** This policy statement encourages unreliable factfinding, is outdated and in many ways incorrect, and therefore should be substantially revised. While it may be that judges and probation officers in some districts require the facts to be proved based on some quantum of reliable evidence, this is not always the case in the Eastern District of North Carolina. Probation officers frequently include third-hand, uncorroborated information from unreliable informants to double or triple the guideline range. This information is all but impossible to defend against because judges, applying the (inadequate) preponderance and "probable accuracy" standards recommended by the

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<sup>44</sup> R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 763 (2001).

guidelines, do not rigorously insist on adequate indicia of evidentiary reliability. Instead, in many cases, it appears as if the alleged information is accepted as fact unless the defendant can disprove it. A typical example is a pre-sentence report stating that the agent stated that the informant stated that the defendant sold him 10 grams of crack every week for two years. In one such case, the defendant was in jail for two months during which he allegedly sold crack to the informant every week. Rather than concluding that the informant must be fabricating, as a jury likely would, the judge deducted two months worth of alleged crack sales from the grand total. This is consistent with, and does not violate, the Commission's policy statement. The policy statement therefore should be revised to ensure fair and accurate resolution of factual disputes, consistent with current Supreme Court decisions, rules of criminal procedure, and statutes. Our specific proposals are contained in the Appendix, Part IV.

## **2. Fed. R. Crim. P. 32.**

**Documentary Information.** In some districts, including the Eastern District of North Carolina and the Northern District of Georgia, probation officers include in the pre-sentence report factual assertions based on documents obtained from the government or from a non-party, such as law enforcement reports or letters from victims, which defense counsel is unable to obtain and therefore unable to effectively rebut. In other districts, disclosure is either standard practice or required by local rules. This has improved fairness and efficiency and has caused no problems. Disclosure should be required in every case, in order to ensure that every defendant has the ability to address the reliability of the information upon which he is being sentenced and to avoid hidden and unwarranted disparity. The Federal Public and Community Defenders therefore support, and ask the Commission to support, a change to Fed. R. Crim. P. 32 as follows:

1. Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer.
2. Where documentary information is submitted by a non-party to the probation officer in connection with a pre-sentence investigation, the officer shall, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties.

**Probation Officer's Recommendation.** Rule 32(e)(3) should be revised to require that the probation officer's recommendation be disclosed in every case, absent good cause shown. As amended in 1994, the Rule establishes a "presumption that a probation officer's sentencing recommendation be disclosed to the parties," *see* 154 F.R.D. 433, 461 (1994), but it still permits the court to direct the probation officer, by local rule or by order in a case, not to disclose the recommendation to anyone other than the court. *See* Fed. R. Crim. P. 32(e)(3). The recommendation contains facts, law, and subjective opinions, to which defendants in only some districts, but not others, have the

opportunity to respond. There appears to be no justification for not requiring disclosure in all cases. The policy against disclosure originated in concerns that the supervisory relationship would be strained if the defendant knew what the officer recommended. That concern no longer exists, as the pre-sentence writer and the supervising officer are no longer the same.

The recommendation is not disclosed in the Northern District of Georgia or the Eastern District of North Carolina, yet it is disclosed in the Middle District of North Carolina. Many districts disclose it, and this has been beneficial and caused no problems. In the District of Arizona, the recommendation is disclosed with both the draft and final pre-sentence report, and this has not been a problem, despite the heavy caseload. This should be the rule for all cases.

These proposals, as well as certain proposals that we believe should *not* be adopted, are explained in the Appendix, Part V.

***I. Support Legislation to Include a Defender Ex Officio.***

The Commission should affirmatively support legislation that would include a representative of the Federal Public Defenders as a nonvoting member of the Commission. The Judicial Conference has supported this change for several years and has proposed legislation to that effect. The Department of Justice, which invariably presses for harsher sentences to make its job easier, has two *ex officio* non-voting representatives. Defense lawyers, who are concerned with the human costs and benefits of sentencing policy, have none. There does not appear to be any legitimate reason for excluding defense interests. It is imbalanced and unfair, deprives the Commission of defense expertise and knowledge, and harms the legitimacy of the Commission and its work. Indeed, the most successful state sentencing commissions include defense lawyers.<sup>45</sup>

***J. Recommend Abolition of Mandatory Minimums.***

Seventeen years ago, the Commission led the way in showing that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.<sup>46</sup> Since then, only more evidence demonstrating that mandatory minimum statutes require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense and racially discriminatory, has accumulated.<sup>47</sup> Further, several judges and

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<sup>45</sup> Barkow, *supra* note 7, at 800. Minnesota's commission includes a public defender, Washington's includes two defense lawyers, and North Carolina's includes a defense lawyer. *See id.* at 772, 778, 783. *See also* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 174 (1995).

<sup>46</sup> *See* USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (1991).

appeals courts recently have found mandatory minimums to be cruel and irrational even if not unusual by Eighth Amendment standards. These decisions have highlighted the related problems of undue severity, unfettered prosecutorial power, and unwarranted disparity. See *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008); *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006).

In its Fifteen Year Review, the Commission detailed many of these problems with support from many sources, including a study by the Department of Justice, showing “that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders.”<sup>48</sup> By virtue of mandatory minimums, sentences for similarly situated offenders vary dramatically depending on the disparate charging and plea bargaining decisions of individual prosecutors,<sup>49</sup> and such decisions “disproportionately disadvantage minorities.”<sup>50</sup> “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”<sup>51</sup>

The Commission should prepare an updated report on mandatory minimums and recommend to Congress that they be abolished. There is now a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, Justice Kennedy and

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<sup>47</sup> *Fifteen Year Review* at 135; Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

<sup>48</sup> See *Fifteen Year Review* at 51 (citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994)).

<sup>49</sup> *Fifteen Year Review* at 84-85, 89-91, 102-04, 106, 141-42; see also Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm’n Before the ABA Justice Kennedy Comm’n 17 (Nov. 13, 2003); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

<sup>50</sup> *Fifteen Year Review* at 91.

<sup>51</sup> *Id.* at 135.

the ABA's Justice Kennedy Commission, and the Constitution Project's Sentencing Initiative.<sup>52</sup>

**K. Eliminate the Crack/Powder Disparity.**

We strongly support the Commission in continuing to work with Congress to eliminate the unwarranted disparity between sentences for crack and cocaine powder offenders. We agree with the Commission that the mandatory minimum for simple possession of crack cocaine should be repealed, and that sentences for powder cocaine should not be raised. We understand that the Commission takes no position on the exact ratio other than that it should not exceed 20:1. We urge the Commission to recommend that penalties for the same quantity of crack and powder cocaine be equalized, as in most of the bills introduced earlier this year, for all of the reasons identified in the Commission's reports. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with other drug types.

An additional reason to recommend a 1:1 ratio is that any disparity between crack and powder cocaine based on drug type invites manipulation of type and quantity. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.<sup>53</sup> These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and a very small increase in the quantity of crack results in a very large increase in the sentence.<sup>54</sup>

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<sup>52</sup> See U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006); Statement of Paul G. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee, Hearing on Mandatory Minimum Sentencing Laws (June 26, 2007), <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf>; Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 59-65 (March 16, 2006); Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994).

<sup>53</sup> Fifteen Year Review at 50, 82.

<sup>54</sup> See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover

Finally, the Commission should recommend a 1:1 ratio because it would eliminate mathematical problems which create disparate ratios between crack and powder cocaine. The current variances in the relationship between crack and powder cocaine, which occur both within guideline ranges and between offense levels, create unwarranted disparity among persons convicted of crack cocaine offenses.

***L. Revise the Guidelines Based on Feedback, Empirical Data, and Research.***

***Relevant Conduct.*** For years, the Defenders, PAG, judges and academics have been urging the Commission to eliminate uncharged and acquitted offenses, including cross-references to more serious offenses, from the guidelines. It is fundamentally unfair to sentence a defendant convicted of one offense based on another offense that was never charged, or of which he was acquitted. This creates disrespect for law. Indeed, attempts to explain the expansive, almost unlimited, reach of relevant conduct to clients (or indeed to any non-lawyer or any lawyer who does not practice federal criminal law) are almost invariably met with shock, incomprehension and disbelief.

The government should not be able to obtain the same sentence as if it had charged and proved the crime when it has failed even to obtain an indictment, or when a jury has rejected the charge. No state guideline system uses uncharged or acquitted crimes. The idea behind its use in the federal guidelines was to avoid transferring sentencing power to prosecutors, but it has done just that, providing prosecutors with a potent and unjust tool to coerce cooperation and guilty pleas, *i.e.*, a drastic sentencing increase based on a mere preponderance of the probably accurate information. Former Commissioner John Steer recently said that acquitted conduct should be removed from the guideline calculation, and that the use of “unconvicted counts” in the same course of conduct or common scheme under § 1B1.3 (a)(2) and (3) “is the aspect of the guideline that [he] find[s] most difficult to defend.”<sup>55</sup>

Cross-references are a particular problem in the Eastern District of North Carolina. Probation officers use them whenever possible. For example, we recently had a case in which the defendant pled guilty to two felon-in-possession counts. The probation officer cross-referenced to the murder guideline and the defendant was sentenced to the statutory maximum of twenty years. Had the defendant actually been charged with murder, he would have had an excellent jury argument for self-defense which may well have resulted in acquittal. Instead, he made the argument to a judge in a hearing with no rules of evidence under a preponderance standard. The judge ignored the argument and sentenced the defendant as a murderer.

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sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

<sup>55</sup> See *An Interview with John Steer, Former Vice Chair of the U.S. Sentencing Commission*, The Champion at 42, September 2008.

In another case, the defendant and his girlfriend had a domestic dispute in the midst of which he left the scene. The girlfriend's brother then drove to the defendant's house to confront him. After words were exchanged, shots were fired at the car by the defendant and others and the brother sustained a minor, superficial injury. The defendant was charged and convicted in state court with assault with intent to kill. Later, he was charged in federal court under § 922(g). Probation cross-referenced not to aggravated assault, but to attempted first degree murder under §2A2.1(a)(1), even though the state never charged the defendant with attempted murder, much less attempted first degree murder. At most, the defendant should have been cross-referenced to § 2A2.1(a)(2). The probation officer's decision to cross-reference to a crime more serious than that for which the defendant was charged and convicted in state court made a difference in the guideline range of at least six levels.

Another client was apprehended with a gun, but no drugs, and charged under § 922(g). In a statement to an ATF agent, he said he had obtained the firearm about five years earlier in exchange for \$20 worth of crack (.1 gram), and that he had sold substantial quantities of cocaine before obtaining the firearm. Based on this statement, the probation officer cross-referenced to § 2D1.1, which, based on the drug quantity admitted, would have resulted in a guideline range well in excess of the statutory maximum. The probation officer eventually relented, but only when the prosecutor agreed that the cross-reference should not apply.

In the Northern District of Georgia, the probation officers include the entire drug quantity or dollar amount from the moment the defendant joined the conspiracy as "jointly undertaken activity." This is included on the basis that it was "foreseeable," which is interpreted to mean "should have known." In 1992, the commentary to § 1B1.3 was amended to attempt to clarify that the defendant is accountable for the acts and omissions of others only if such acts or omissions were both reasonably foreseeable and within the scope of the defendant's agreement. Probation officers in the Northern District of Georgia operate on the assumption that the conduct was within the scope of the agreement, and shift the burden to the defendant to show that it was not. Sometimes the probation officer will amend the report in response to our interpretation, but whether or not we succeed often depends on whether the probation officer has enough time to even consider the argument. If the probation officer does not fix the problem, some of our judges accept the probation version wholesale.

This is a longstanding problem and remains unremedied by the commentary.<sup>56</sup> The concepts are just too esoteric. Any concept that requires eight single-spaced pages of

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<sup>56</sup> See U.S. Sentencing Commission, Staff Discussion Paper, *Relevant Conduct* at 10-11 & n.10 (1996) (recommending narrowing the scope of relevant conduct, including accomplice and conspiratorial liability for the conduct of others, as a way of decreasing complexity and unfairness, and reducing the prosecutor's power in the plea process); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997) (in a sample test administered by Commission researchers for the Federal Judicial Center in 1997,

examples to explain it must be hopelessly unclear. Instead of using abstract terms like “reasonably foreseeable” and “scope of the specific conduct and its objectives embraced by the defendant’s agreement,” the Commission should try something simpler and more direct. For example:

In order for the defendant to be accountable for the acts or omissions of another person, the government must prove through concrete evidence that the defendant directly conspired with or aided and abetted that person, and knew about, intended and agreed to that person’s acts or omissions.

In addition, the Commission should (1) state in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of “relevant conduct”; (2) significantly lessen the impact of charged counts that are dismissed as part of a plea agreement by limiting their impact on the guideline range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction as determined under § 1B1.3(a)(1); and (3) eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3.

**Drugs.** The drug guidelines are too severe, and should be amended to reflect empirical data and national experience. If the Commission still feels bound by the mandatory minimums, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels. *See* USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007). This is true of all of the drug guidelines, and should be addressed.

**Career Offender.** The career offender guideline, promulgated in response to 28 U.S.C. § 994(h) and then broadened beyond the statutory terms, is contrary to empirical evidence and national experience, as shown by the Commission’s own research, the sentencing data, and judicial decisions. The guideline fails to serve any of the purposes of sentencing in the majority of cases in which it applies, *i.e.*, those involving prior drug convictions, and has a disproportionate impact on African Americans.<sup>57</sup> Exacerbating these problems, the Commission’s definitions of predicate offenses are broader than § 994(h) requires.

The Commission should present its findings to Congress with a recommendation that § 994(h) be repealed. In the meantime, the Commission should narrow the guideline

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probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant).

<sup>57</sup> Fifteen Year Review at 133-34.

so that it applies no more broadly than the statute requires. The Defenders have previously submitted extensive comment describing the serious problems with the career offender guideline and proposing reasonable solutions, most recently in our Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 8-19, September 8, 2008, which we incorporate by reference.

**Immigration.** There is a rapidly growing Hispanic population in the Eastern District of North Carolina which has led to an increasing number of immigration prosecutions, but there is no authorized fast track program. Likewise, in the Northern District of Georgia, due to the large immigrant population and international airport in Atlanta, we have a large number of Hispanic clients charged with illegal re-entry, but there is no fast track program for these clients.<sup>58</sup> In 2007, the government moved for early disposition departures in twenty other districts, both on and off the border, in districts with and without heavy immigration caseloads.<sup>59</sup>

Both the Fourth and Eleventh Circuits have held that judges may not vary based on fast-track disparity.<sup>60</sup> While these decisions appear to be wrong in light of *Gall* and *Kimbrough* for the reasons articulated by the First and Second Circuits, see *United States v. Seval*, 293 Fed. Appx. 834 (2d Cir. Sept. 25, 2008), *United States v. Rodriguez*, 527 F.3d 221 (1<sup>st</sup> Cir. 2008), they remain the law in the Fourth and Eleventh Circuits.

As a result, most clients convicted of illegal re-entry are sentenced within the draconian guideline range of USSG § 2L1.2. Their sentences are disproportionately high for no reason grounded in the purposes of sentencing. As noted above, our clients know what sentences are being given in other districts, and it is difficult for them to understand why they are looking at four to seven years when an identical person apprehended in Arizona or New Mexico is facing only one or two years.

In 2003, after the Protect Act was passed, the Commission reported that at least 40% of non-substantial assistance departures in 2001 were initiated by the government, and that most of these were fast-track departures.<sup>61</sup> The Commission concluded:

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<sup>58</sup> The only fast track program authorized by the Attorney General in the Northern District of Georgia is for illegal identification documents at the airport.

<sup>59</sup> See USSC, 2007 Sourcebook of Federal Sentencing Statistics, Appendix B, <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>.

<sup>60</sup> See *United States v. Perez-Pena*, 453 F.3d 236 (4<sup>th</sup> Cir. 2006). The Eleventh Circuit held that sentencing judges may not vary based on fast-track disparity soon after *Booker*. See *United States v. Arevalo-Juarez*, 453 F.3d 236 (11<sup>th</sup> Cir. 2006). Following the circuit rule that prior precedent may be overruled only by the en banc court or by the Supreme Court, a split panel of the Eleventh Circuit upheld *Arevalo-Juarez* because *Kimbrough* did not “expressly” overrule it. See *United States v. Vega-Castillo*, 540 F.3d 1235 (11<sup>th</sup> Cir. 2008).

<sup>61</sup> U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* iv-v (October 2003).

Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.<sup>62</sup>

The Commission could address this unwarranted disparity by encouraging judges, in a note to § 5K3.1, to depart or vary downward to take account of it.

The underlying and most significant problem, however, is that guideline ranges under § 2L1.2 are too severe, and lack any empirical basis.<sup>63</sup> Most of these defendants pose no danger whatsoever. For example, a Jamaican client in the Northern District of Georgia, seventeen years before his federal arrest for illegal re-entry, had been convicted in Georgia state court of a drug distribution offense for which he was sentenced to thirty years. He was paroled after three years and deported. He returned to the United States, married, had a child, ran his own business, and was never charged with another crime. He was arrested after having an argument with his stepson in a restaurant parking lot. His one seventeen-year-old conviction placed him at a level 24 and criminal history category III. After a reduction for acceptance of responsibility, he faced a sentence of 46 to 57 months, although no one believed he was a danger to anyone or would commit another crime. Fortunately, his arrest came soon after the Supreme Court's decision in *Blakely*, and he was given a much shorter sentence on that basis. But prison was not appropriate at all, given his history of rehabilitation and the complete lack of risk he posed to the community.

The Commission should either encourage downward departure or variance, or reduce the harshness of this guideline.

**Child Pornography.** As has been well-documented, USSG § 2G2.2 is dramatically flawed.<sup>64</sup> It does “not exemplify the Commission’s exercise of its

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<sup>62</sup> *Id.* at 66-67.

<sup>63</sup> Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar./Apr.1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

<sup>64</sup> See Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, July 3, 2008.

characteristic institutional role.”<sup>65</sup> Many judges have found this guideline to be unsound and inhumane.<sup>66</sup>

In the Eastern District of North Carolina, however, the guideline sentence is routinely imposed. Whether the defendant is convicted of possession, receipt or distribution, a 5-level increase for distribution is typical because file sharing or trading is increasingly the way images are obtained. The 2-level computer enhancement applies in almost every case.<sup>67</sup> A defendant who traded images with more than one person or chatted online to an agent he thought was a minor gets another 5 levels for “pattern of activity involving the sexual abuse or exploitation of a minor.” The number of images adds another 2 to 5 levels, and so on. In short, as documented in many cases rejecting the guideline, the range for a first offender convicted of either possession (with a ten-year maximum) or receipt/distribution (with a twenty-year maximum) easily exceeds the statutory maximum, and indeed often exceeds the guidelines chart, with an offense level of 45 possible before adjustment for acceptance of responsibility.

This guideline invites draconian and manipulative charging practices by prosecutors. In the past, some defendants in the Northern District of Georgia, usually first offenders, were charged with or allowed to plead to only possession of child pornography. A few of the judges imposed sentences of probation for possession in special cases, *i.e.*, the defendant was mentally retarded or extremely physically ill, and judges also imposed below guideline prison sentences in some cases. Prosecutors now insist on a plea to receipt, thus ensuring a five-year mandatory minimum. Defendants who sent even a single image to an agent during a chat are charged with distribution, in addition to possession and receipt, so that the statutory maximums, when stacked, add up to fifty years.

As a result of the severity of the guideline and the government’s harsh charging policies, more and more of these cases are proceeding to trial. In non-distribution cases, the government offers to drop the possession charge and agree to a plea to receipt, with a mandatory minimum of five years and a maximum of twenty years, in exchange for a full

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<sup>65</sup> *Kimbrough*, 128 S. Ct. at 575.

<sup>66</sup> See *United States v. Vanyliet*, 542 F.3d 259 (1<sup>st</sup> Cir. 2008); *United States v. Grober*, \_\_ F.Supp.2d \_\_, 2008 WL 5395768 (D. N.J. Dec. 22, 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M.D.Fla. Dec. 19, 2008); *United States v. Stern*, 2008 U.S. Dist. LEXIS 102071 (N.D. Ohio, Dec. 17, 2008); *United States v. Johnson*, \_\_ F.Supp.2d \_\_, 2008 WL 5115047 (S.D. Iowa Dec. 4, 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. Aug. 13, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Taylor*, slip op., 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, slip op., 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008).

<sup>67</sup> In the past five years, the Defender Office in the Northern District of Georgia has had only two cases that started as traditional postal investigations, and one of those had a computer as well.

waiver of appeal and all post-conviction rights. In distribution cases, the government either offers nothing or a plea to receipt and distribution, with the severe waiver of rights described above. First offenders with no prior criminal record face sentences that are effectively life sentences. There is no incentive to plead. As a result, more jurors are exposed to these images, and more children are re-victimized.

**Fraud.** The fraud guideline, USSG § 2B1.1, can easily produce sentences that are greater than necessary to satisfy sentencing purposes. First, it “place[s] undue weight on the amount of loss involved in the fraud,” which in many cases “is a kind of accident” and thus “a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”<sup>68</sup> Second, it imposes cumulative enhancements for many closely related factors.<sup>69</sup>

Because loss often is not the best indicator of culpability, a guideline driven by loss treats different offenders the same. For example, in the Northern District of Georgia, we have a 67-year-old client who was recently sentenced to prison for health care fraud. This was his first offense. His clinics treated real patients with real health problems and billed the insurance company under the wrong code because it would not otherwise pay for the treatment. His guideline range was the same as it would have been if he had billed for ghost patients (ones who did not exist) or for procedures that were never performed. As a first offender, he was sentenced to prison solely because of the loss amount involved, and even though his co-defendant made full restitution to the insurance company.

Section 2B1.1 is also unduly complicated and cumulative. Approximately forty specific offense characteristics replicate or overlap with the loss concept, with one another, and with further upward adjustments under Chapter 3. Section 2B1.1 exemplifies what the Commission’s Fifteen Year Review calls “factor creep,” where “more and more adjustments are added” and “it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”<sup>70</sup> Citing to a 1999 speech by Justice Breyer, the Fifteen Year Report notes that “[c]omplex rules with many adjustments may foster a perception of a precise moral calculus, but on closer inspection this precision proves false.”<sup>71</sup>

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<sup>68</sup> *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004).

<sup>69</sup> Constitution Project’s Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9-10 (July 11, 2006); *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004).

<sup>70</sup> Fifteen Year Report at 137, citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (Complexity of Guidelines has created a “façade of precision” which “undermines the goals of sentencing.”).

<sup>71</sup> Fifteen Year Review at 137, citing Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 (Jan./Feb. 1999).

District court feedback on this guideline shows that it is badly in need of revision. For example, in *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. July 20, 2006), Judge Rakoff reduced a life sentence to 42 months based on the purposes of sentencing and individual factors in the case. Describing the guideline calculation, he said:

[T]he total offense level of 46 determined by the Court (i.e., a base level of 6, plus a 24 points for loss, plus 16 points for adjustments and enhancements) was 9 points less than the level of 55 recommended by the Government (i.e., a base level of 7, plus 28 points for loss, plus 20 points for adjustments and enhancements). But, under the guidelines, this 20% reduction in the offense level made absolutely no difference in the recommended guideline sentence—for as noted, the guidelines recommend life imprisonment for every offense level over 42. Moreover, as a practical matter, a sentence of life imprisonment was effectively available here, for the statutory maximum sentence for the combined five counts of which Adelson had been convicted was 85 years, which, given his current age of 40, would have led to his imprisonment until the age of 125. Even the Government blinked at this barbarity.

*Id.* at 511. Confronting a similar problem in *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), Judge Block recognized that the guideline range of 360 months to life, the result of guideline increases driven by highly publicized major frauds such as Enron, defied common sense in the comparatively run of the mill securities fraud case before him. He sentenced the defendants to 60 months, based primarily on similarities and differences between the case before him and other securities fraud cases compiled by the parties.

The initial Commission increased sentences for economic crimes above past practice to provide a “short but definite period of confinement for a larger proportion of these ‘white collar’ cases” in the belief that this would “ensure proportionate punishment and . . . achieve deterrence.”<sup>72</sup> As to deterrence, research has shown no difference in deterrent effect for white-collar offenders, presumably the most rational group of offenders, even between probation and imprisonment.<sup>73</sup> The guideline has been ratcheted up over time in response to pressure from DOJ, perceived signals from Congress, and direct interference by Congress. See Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-20 (1989); Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 387-435 (2004).

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<sup>72</sup> Fifteen Year Review at 56.

<sup>73</sup> See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995); Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35 (Cambridge University Press) (2002).

The Commission should now simplify and reduce the severity of this guideline, based on empirical data and national experience.

***Mitigating Role Adjustment.*** The mitigating role adjustment, while a sound concept, does not work well in practice. One problem is that its effect is often dwarfed by drug quantity or dollar amount, which often has nothing to do with culpability. Unless the Commission significantly reduces the effect of dollar amount and drug quantity, the number of points for a mitigating role adjustment should be increased to at least six.

Another problem is that it is too rarely used because of the belief, suggested by some case law, that any defendant whose participation is “integral” to the success of the offense could not have played a minor or minimal role. Thus, a drug mule cannot get a mitigating role adjustment because, in a strictly logical sense, without her the offense could not have been carried out, despite the fact that she was easily replaceable and her role was clearly less, relative to other participants like managers, distributors, and kingpins. The question should not be, “Could the offense succeed without this defendant?” Rather, it should be, “In relation to all of the participants in the offense, where does this defendant fall in the pecking order?” Even if their actions are in some sense “essential” to the success of the offense, defendants who perform non-supervisory roles should have that reflected in their sentences.

Some judges have a flat policy, express or implied, against giving a mitigating role adjustment to drug mules when the only quantity included in calculating the guideline range is the quantity the defendant carried or swallowed. This interpretation persists despite Application Note 3(A). Drug mules are expected to somehow prove a mitigating role in a drug organization about which they have little or no information other than a telephone number. Further, probation officers generally do not recognize that the adjustment may be appropriate in cases other than drug cases.

The Commission should define the adjustment in a way that invites its use in more cases. Deleting the word “substantially” would be helpful. Examples should be given to illustrate that a defendant’s having been “integral” to the offense does not preclude the reduction, and to illustrate the proper application of Note 3(A). Examples should be given to show that the reduction is appropriate in cases other than drug cases. For example, those in fraud cases who carry out low-level functions for a small amount of money, *e.g.*, those who open the fake account, deposit the check, show up at a closing with a fake ID, appraise the property, should receive a mitigating role adjustment. In a robbery case, if the person who commits the robbery unexpectedly pulls or shoots a gun, the driver who knew nothing about it, even if it may have been “foreseeable” in the abstract, should receive a mitigating role adjustment.

***Acceptance of Responsibility.*** The Commission should remove the government motion requirement for the third point for acceptance of responsibility under USSG § 3E1.1, or seek permission from Congress to do so if necessary. In many districts, including the Northern District of Georgia, the government uses this requirement as an

offensive weapon, threatening the loss of the third point if defendants do not waive appeal and post conviction relief, or if they pursue motions to suppress. This is contrary to the language of the guideline, *i.e.*, “the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty,” and its stated purpose, *i.e.*, because the government “is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial.” USSG § 3E1.1, comment. (n.6). However, since the prosecutor is in sole control of the motion, they are free to apply whatever interpretation they wish.

***USSG § 1B1.8, Use of Certain Information.*** This guideline excludes information from being used in calculating the guideline range if as part of a cooperation agreement the government agrees that it will not be used. The guideline can be read as only applying to information given after there is an agreement or as applying to information given before there is an agreement if the government later agrees.

In the Eastern District of North Carolina, if a defendant cooperates as early and fully as possible by making an immediate statement after apprehension, that information is used to calculate the guideline range even when the defendant later enters into an agreement because he had not yet entered into an agreement when he made the statement. In the Northern District of Georgia, some defendants, before they are represented, provide information about the identity and activities of others who are otherwise unidentifiable. Whatever they have said is used to calculate their guideline range because they gave the information without a formal agreement. This punishes defendants who cooperate early more harshly than those wise enough to wait.

Further, the guideline is not applied consistently. Based on a survey of Defenders, the practice differs among districts, among prosecutors within a single district, and among cases. Some prosecutors agree that information provided before there is an agreement will not be used to calculate the guideline range. Others, as in our districts, refuse to agree that pre-agreement statements are protected.

The problem can easily be cured by revising § 1B1.8 to provide that, if a defendant enters a plea/cooperation agreement with the government, protection relates back to any earlier statements. Leaving it up to prosecutors creates unwarranted disparity.

## APPENDIX

### ***I. The Commission Should Amend USSG § 1A2, Intro. to Accurately Reflect § 3553(a) and the Supreme Court's Decisions.***

The new commentary in USSG § 1A2, entitled “Continuing Evolution and Role of the Guidelines,” which was not the subject of public notice and comment,<sup>74</sup> inaccurately describes the sentencing procedures and standards set forth in § 3553(a) and the Supreme Court’s cases. An accurate description would better ensure the continuing relevance of the guidelines, the courts’ role in their constructive evolution, and the continuing constitutionality of the guidelines.

First, the commentary sets forth a three-step sentencing procedure that differs little from that struck down by the Court. According to the commentary, the court “must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a).” This is not at all what the statute says and is contrary to what the Court has said: “The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.” *Booker*, 543 U.S. at 234. The “Guidelines are only one of the factors to consider when imposing sentence.” *Gall v. United States*, 128 S. Ct. 586, 602 (2007). The “Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.” *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007). “The statute, as modified by *Booker*, contains an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary,’ to achieve the goals of sentencing.” *Id.* at 570. Judges “may not presume that the Guidelines range is reasonable.” *Gall*, 128 S. Ct. at 596-597. *See also Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (“We repeat that . . . the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”); *Nelson*, 2009 WL 160585 at \*2 (“The Guidelines are not only *not*

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<sup>74</sup> Although Rule 4.3 of the Rules of Practice and Procedure currently permits the Commission “to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x),” we again urge the Commission to provide notice and comment with respect to commentary, policy statements and amendments thereto. While there may have been a rationale for treating commentary and policy statements differently from guidelines in the past, there is no reason to do so post-*Booker*, as the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission.

In the commentary to § 1A1.1, the Commission credits the notice and comment requirement with bolstering its ability to take into account fully the purposes of sentencing when promulgating guidelines. Surely, providing notice and soliciting comment with respect to commentary which seeks to explain so critical an issue as the role of the guidelines in federal sentencing as a result of landmark Supreme Court decisions would similarly bolster the Commission’s ability to provide a more balanced and helpful assessment of the impact of the decisions. As the Commission has said previously, “because the Commission values public input, the Commission traditionally attempts to solicit public comment, even when not required to do so.” *See USSC, Report to the Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendment*, at 4 (May 2001).

*mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”) (emphasis in original).

In *Gall*, and repeated in *Nelson*, the Court set out a very different three-step procedure: First, “begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” Second, “after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” Third, the judge should explain. *Gall*, 128 S. Ct. at 596-97. In *Nelson*, the Court said: “Instead, the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.” *Nelson v. United States*, \_\_ S. Ct. \_\_, 2009 WL 160585 \*1 (Jan. 26, 2009). In *Gall*, the Court made no mention of the Commission’s policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by those policy statements. Thus, to suggest that policy statements on departure must be consulted as the second step in sentencing is simply wrong.

At page 2465 of *Rita*, which the commentary cites for the Commission’s three-step procedure, the Court described no such three-step procedure but listed “outside the heartland” as one of several possible arguments for a non-guideline sentence:

The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3553(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the “heartland” to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless.

*Rita*, 127 S. Ct. at 2465.

Policy statements regarding departure are not a second step of the sentencing procedure. They are merely one argument the court may consider, if made. They are not considered in every case, and need not be considered even when their subject matter is implicated, as demonstrated in *Gall*. The Commission should replace its three-step procedure with the statute itself and the procedure set forth in the Court’s decisions.

Second, the commentary entirely omits those aspects of the Court’s decisions that invite a critical assessment of the guidelines, which are intended to assist in the evolution of the guidelines, and which preserve the constitutionality of the guidelines. It fails to note that judges may impose a sentence outside the recommended guideline range even in a “mine run” case when the judge determines that a non-guideline sentence better

complies with § 3553(a). This may occur, for example, when the court determines that the guideline represents an “unsound judgment” based “solely on policy considerations, including disagreements with the Guidelines.” *Rita*, 127 S. Ct. at 2468; *Kimbrough*, 128 S. Ct. at 570; *Spears*, \_\_ S. Ct. \_\_, 2009 WL 129044 \*3 (Jan. 21, 2009) (“we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines”). The commentary should note that the ability of judges to impose a sentence outside the recommended range for policy reasons is a crucial feature of the new system because it preserves the constitutionality of the now-advisory guidelines.<sup>75</sup> It certainly seems desirable to acknowledge, rather than omit, this constitutional reality within the *Guideline Manual*.

As the rationale for permitting a presumption of reasonableness on appeal, for the guidelines being the starting point and initial benchmark, and for requiring careful consideration of the extent of a variance, the Court said that the guidelines were *generally* based on empirical evidence of past practice and that they *can* evolve in response to court decisions and input from stakeholders.<sup>76</sup> However, this account of guideline development reflects the ideal envisioned in the SRA, and not necessarily the reality with respect to a given guideline. “Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guideline range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.” *Gall*, 128 S. Ct. at 594 n.2. While “[i]n the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports,” it “did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.” *Kimbrough* at 567. When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)’s purposes, even in “a mine-run case.” *Id.* at 575.

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<sup>75</sup> See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (system that does not permit judges to sentence above a recommended range based on “general objectives of sentencing” alone without a “factfinding anchor” violates the Sixth Amendment.).

<sup>76</sup> As the rationale for permitting, but not requiring, a presumption of reasonableness on appeal, the court said that it was “fair to assume” that the guidelines reflect a “rough approximation” of sentences that “might achieve 3553(a) objectives” because original Commission used an “empirical approach” based on “past practice” and the guidelines “can” evolve in response to non-guideline sentences and input from practitioners and experts. *Rita*, 127 S. Ct. at 2464-65. As the rationale for requiring “that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate,” the Court said that the guidelines are the product of “careful study” based on “extensive evidence” derived from “thousands” of pre-guideline sentences. *Gall*, 127 S. Ct. at 594. And, as the rationale for the guidelines being the starting point and benchmark, the Court said that the Commission has the “capacity” to base the guidelines on “empirical evidence and national experience.” *Kimbrough*, 128 S. Ct. at 574.

Importantly, the principle that district courts can disagree with guidelines based solely on policy considerations applies to all guidelines, not just the crack guidelines. Otherwise, judges could vary based only on factfindings, and this would violate the Sixth Amendment. See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007). *Kimbrough* did not limit the principle to the crack guidelines; indeed, it referred to the drug guidelines generally as not being based on an empirical approach. The courts of appeals have read the principle as applying to all guidelines. See, e.g., *United States v. Cavera*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 24717, \*24 (2d Cir. Dec. 4, 2008) (en banc); *United States v. Barsumyan*, 517 F.3d 1154, 1158 (9th Cir. 2008); *United States v. White*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 26095, \*14-15 (6th Cir. Dec. 24, 2008) (en banc); *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Smart*, 518 F.3d 800, 808-09 (10th Cir. 2008).

The commentary not only ignores this important aspect of the Supreme Court's decisions and its impact on sentencing and the evolution of the guidelines, but unjustifiably suggests that the decisions affirm the guidelines' central role in sentencing. For example, the commentary cites *Rita* for the proposition that the guidelines remain an important part of sentencing because they "seek to embody the § 3553(a) considerations." However, it fails to explain that, in *Rita* itself, as well as in *Gall*, *Kimbrough* and *Spears*, the Court expressly recognized that the guidelines do not always embody the § 3553(a) considerations. *Rita*, 127 S. Ct. at 2465, 2468 (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way).

Judges may now consider whether a particular guideline is based on empirical data, national experience and expert research, and this is a crucial element in the ongoing revision of the guidelines, as anticipated by the Court. The appellate presumption of reasonableness for a guideline sentence permitted by *Rita* explicitly does not allow courts of appeals to afford "greater factfinding leeway to [the Commission] than to [the] district judge." *Id.* at 2463. Challenges to guideline recommendations can generate testimony, findings and other information that the Commission can use in its ongoing review and revision of the guidelines. These challenges should at least be acknowledged, and preferably encouraged, to ensure adequate feedback and healthy evolution of the guidelines system.

To this end, the commentary should include the Supreme Court's holdings that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough*, 128 S. Ct. at 570, that courts must consider arguments by either party "that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way," *Rita*, 127 S. Ct. at 2468, that when the guidelines at issue in the case "do not exemplify the Commission's exercise of its characteristic institutional role," it is not an abuse of discretion for the judge to conclude that they "yield[] a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine-run case," *Kimbrough*, 128 S. Ct. at 575, and that judges should openly exercises

their judgment to impose a sentence that is sufficient, but not greater than necessary, to achieve §3553(a)'s purposes. *Spears*, 2009 WL 129044 at \*3-4.

Third, the commentary provides an incomplete description of appellate review, including only the guidelines and extent of variance as issues for review, while omitting all other potential procedural errors: treating the guidelines as mandatory, failing to consider the purposes and factors set forth in § 3553(a), selecting a sentence based on clearly erroneous facts, and failing to explain the sentence whether inside or outside the guideline range. It omits the requirement that courts of appeals must accord due deference to the judge's decision as to the extent of a variance. And it omits that no special deference is due if the case is unique. The Court described appellate review as follows:

*Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . . It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. . . . The uniqueness of the individual case . . . does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.*

*Gall*, 128 S. Ct. at 597-98 (emphasis supplied). The Commission should include the italicized language.

Fourth, the commentary inaccurately suggests that Congress can impose mandatory sentencing practices on the courts by issuing specific directives to the Commission: "Congress retains the authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines." This clearly suggests that Congress may use the Commission as a conduit for mandatory sentencing rules. The full quotation from *Kimbrough* is as follows: "Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required *the Sentencing Commission* to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum. 28 U.S.C. §

994(h).” *Kimbrough*, 128 S. Ct. at 571 (emphasis supplied). The Court’s comment addressed the government’s argument that the Anti-Drug Abuse Act “implicitly” required *the Commission* to write guidelines corresponding to the statutory mandatory minimums and extrapolating below, between and above those two levels, and explained that there was no congressional directive *to the Commission* to do so.

When Congress directs the Commission to promulgate or amend a guideline, even in express terms, the resulting guideline is *not* a mandate to the courts but one factor for the courts to consider under § 3553(a). The courts have so found in a variety of contexts,<sup>77</sup> and the Department of Justice has wisely agreed.<sup>78</sup> If it were otherwise, the separation of powers problem that most troubled the Court in *Mistretta* would arise, *i.e.*, that “the reputation [of the Judicial Branch] for impartiality and nonpartisanship . . . may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989). The Commission should remove this inaccurate and problematic suggestion.

## **II. The Commission Should Encourage the Use of Probation and Evidence-Based Alternatives.**

We thank the Commission for holding a symposium on alternatives to incarceration last summer so that the federal system could learn from the states how to reduce costs and protect the public through non-prison alternatives. Consideration of alternatives to incarceration was to be a priority for the Commission this amendment cycle. Accordingly, the Chair of the Federal Defender Sentencing Guidelines Committee submitted a list of well-considered proposals, which we incorporate by reference.<sup>79</sup> See

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<sup>77</sup> See, e.g., *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008) (fast track); *United States v. Liddell*, 543 F.3d 877 (7<sup>th</sup> Cir. 2008) (career offender); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Grober*, \_\_ F.Supp.2d \_\_, 2008 WL 5395768 (D. N.J. Dec. 22, 2008) (child pornography); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008) (child pornography).

<sup>78</sup> Brief of the United States at 29, *Kimbrough v. United States* (“As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under Booker and subject to the general principles of sentencing in section 3553(a).”); Letter Stating the Government’s Position on the Career Offender Guideline, docketed March 17, 2008, *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) (“position of the United States” is that “*Kimbrough*’s reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts.”) (emphasis in original), available at [http://www.fd.org/pdf\\_lib/Funk\\_ausa\\_Letter.pdf](http://www.fd.org/pdf_lib/Funk_ausa_Letter.pdf).

<sup>79</sup> Those proposals are: (1) expand the availability of alternatives to all offenders who are statutorily eligible without regard to the zone system; (2) amend Chapter Five to add a “first

Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 20-26, September 8, 2008. The Commission's proposed amendments and issues for comment for this cycle unfortunately do not include alternatives to incarceration. At the same time, the Commission has issued a report showing that federal courts impose alternative sentences significantly less often than allowed by the guidelines, and far less often than permitted by statute.<sup>80</sup> Even when courts sentence an offender to an alternative sentence, rates vary significantly among offenders and categories, with the result that a disproportionately high rate of minorities and those with little education end up behind bars.<sup>81</sup> We hope that the Commission will implement the proposals made in the Defenders' letter, and the proposals we make here, next amendment cycle.

As confirmed by the Commission's recent report, non-prison alternatives are not part of the culture of sentencing in federal court.<sup>82</sup> Judges must consider all of "the kinds of sentences available" under 18 U.S.C. § 3553(a)(3), even if the "kinds of sentence . . . established [by] the guidelines" permit or encourage only prison. *See Gall v. United States*, 128 S. Ct. 586, 602 & n.11 (2007). Yet here in the Northern District of Georgia, we have seen only a small increase in split sentences and probation with home confinement for defendants who would not qualify under the guidelines' zone system. No change has occurred in the Eastern District of North Carolina. For many of our clients in the Northern District of Georgia who are non-violent first offenders, pretrial diversion or probation with drug treatment would be the appropriate sentence, but we have had very little success in convincing judges or probation officers to go along with such programming. In the rare case in which we have been successful, we must find the program and the client must pay for it.

President Obama has pledged to "give first-time, non-violent offenders a chance to serve their sentence, where appropriate, in the type of drug rehabilitation programs that have proven to work better than a prison term in changing bad behavior."<sup>83</sup> If the Commission were to legitimize this and other sensible non-prison options in the guidelines, probation officers and judges would cooperate in implementing them. Resources are being wasted on imprisoning people who do not need to be in prison.

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offender safety valve"; (3) amend Chapter Five to encourage specific alternative sanctions and programs that have been proven to decrease the risk of recidivism; (4) amend Chapter Seven to recognize and encourage a defendant's participation in reentry programs; and (5) recommend that the Bureau of Prisons revise its policies to address the problem of over-incarceration.

<sup>80</sup> USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009).

<sup>81</sup> *Id.* tbls. 8, 11, & 13.

<sup>82</sup> In 2007, just under 18% of federal offenders who are U.S. citizens fell into Zones A, B, or C of the Sentencing Table, making them eligible for a within-guidelines sentence other than straight prison. *Id.* tbl. 5. Of that small number, only 38% were sentenced to probation only, while the rest were sentenced to some term of confinement. *Id.* at 5 & tbl 5.

<sup>83</sup> *See* [http://www.whitehouse.gov/agenda/civil\\_rights/](http://www.whitehouse.gov/agenda/civil_rights/).

Many offenders would be much less likely to recidivate if those resources were spent on treatment, education, and job training instead of prison.

***A. The Commission Should Ensure that the Threshold Question is Whether Probation is Appropriate, Not How Long the Defendant Should Be Imprisoned.***

Chapter 5 should begin with a statement that probation is a sentence in and of itself, which is permissible in every case where a statute does not require imprisonment. This statement also should recommend that courts address at the outset in every case in which probation is statutorily allowed whether prison is necessary to satisfy any purpose set forth in § 3553(a)(1), (2) or (3). This threshold question is routinely ignored in favor of the “how long” question because of the way the Zones cabin discretion -- the guidelines authorize probation only if the guideline range is in Zone A (calling for 0 to 6 months imprisonment), or, if the range is in Zone B (calling for 1 to 12 months imprisonment), and then only if intermittent confinement, community confinement or home detention is substituted for imprisonment. Prison is required in every case in Zones C and D (calling for anywhere from 8 months to life).

The introductory commentary in Chapter Five, Part B, entitled “Probation,” while helpful, goes unnoticed because the guidelines do not allow probation in most cases and it is located in a Part entitled “Probation.”<sup>84</sup> The U.S. Probation’s Monograph, which states that “[o]fficers should consider the appropriateness of any available alternatives before deciding to recommend a term of imprisonment,” goes unnoticed for the same reason.<sup>85</sup> The Commission’s recent report confirms “that sentencing zone ultimately determines whether offenders are sentenced to alternatives. Specifically, guideline offense level and Criminal History Category, alone or in combination, are the principal factors determining whether an offender receives an alternative sentence.”<sup>86</sup>

These limits on probation are particularly unfortunate because Congress expected that the threshold question in most cases would be whether probation was sufficient or whether prison was required. In the Sentencing Reform Act, Congress instructed judges as follows:

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<sup>84</sup> That commentary states, “The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.”

<sup>85</sup> Publication 107 at II-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

<sup>86</sup> USSC, *Alternatives to Incarceration in the Federal Criminal Justice System*, at 12 (Jan. 2009).

The court, in determining *whether* to impose a term of imprisonment, and, *if* a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. § 3582(a) (emphasis supplied). “This section specifies the factors to be considered by a sentencing judge in determining *whether* to impose a term of imprisonment and, *if* a term is to be imposed, the length of the term.” S. Rep. No. 98-225 at 116 (1983) (emphasis supplied). “The phrase ‘to the extent that they are applicable’ acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.” *Id.* at 119 n.415.

Consistent with this directive to judges, Congress directed the Commission to promulgate guidelines for both the “in/out” question, and the “if prison, how long” question:

The Commission . . . shall promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence . . . including -- (A) a determination *whether* to impose a sentence to probation, a fine, or a term of imprisonment [and] (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment.

28 U.S.C. § 994(a)(1)(A) & (B) (emphasis supplied).

Congress also identified when probation should be the presumptive sentence, and encouraged the use of non-prison alternatives. Probation would be generally appropriate in “cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” *See* 28 U.S.C. § 994(j). Some term of imprisonment would be generally appropriate for “a person convicted of a crime of violence that results in serious bodily injury.” *Id.*

For defendants between these poles, Congress encouraged the use of non-prison sentences in a variety of ways. *First*, “in light of current knowledge that imprisonment is not an appropriate means of promoting correction and rehabilitation,” S. Rep. No. 98-225 at 76 (1983), it directed the Commission and the courts to use prison only if it served some purpose of sentencing *other* than rehabilitation, and to use probation in all other circumstances. *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225 at 119, 176 (1983). Congress specifically noted that “if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation.” *Id.* at 171 n. 531. *See also id.* at 92 (Committee “expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions”).

Second, Congress recognized that probation would often satisfy the other purposes of sentencing: “It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose. This is particularly true in light of the new requirement in section 3563(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service.” *Id.* Indeed, Congress recently restored payment of fine, restitution and community service as the three options for a mandatory condition of probation.<sup>87</sup> See Pub. L. No. 110-406, Sec. 14(a) (Oct. 13, 2008), amending 18 U.S.C. § 3563(a)(2). And the Supreme Court in *Gall* recognized the substantial restriction of liberty involved in even standard conditions of probation, *Gall*, 128 S. Ct. at 595-96 & n.4, and that in some cases, “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” *Id.* at 599 (quoting district court opinion).

Third, Congress provided numerous examples of when probation *should* be used, based on the very same factors that the policy statements in the Guidelines Manual prohibit or discourage from consideration. Through the directives in 28 U.S.C. § 994(d) and (e), Congress sought to guard against the use of incarceration to warehouse defendants who lacked the advantages of education, employment, and stabilizing ties, and specifically encouraged their use as a reason for probation.<sup>88</sup> Regarding the directive to the Commission to assure that the guidelines and policy statements were “entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders,” 28 U.S.C. § 994(d), the Senate Report explained:

The Committee added [this] provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training. Indeed, *in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training.* This qualifying language in subsection (d), when read with the provisions in proposed Section 3582(c) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a

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<sup>87</sup> The new law also restores community confinement as a discretionary condition of supervised release and maintains intermittent confinement “only for a violation of supervised release in accordance with section 3583(e)(2) and only when facilities are available.” See Pub. L. No. 110-406, Sec. 14(b) (Oct. 13, 2008), amending 18 U.S.C. § 3583(d).

<sup>88</sup> S. Rep. No. 98-225 at 175, 172-73 (1983).

*defendant should not be sent to prison only because the prison has a program that "might be good for him."*

S. Rep. No. 98-225 at 171 & n.531 (1983) (emphasis supplied). In other words, the Commission was to provide for probation to rehabilitate defendants who were poor, uneducated, and in need of education and vocational training, so long as prison was not necessary for some other purpose of sentencing.

Emphasizing the same point in explaining the directive to the Commission to "assure that the guidelines, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties," 28 U.S.C. § 994(e) (emphasis supplied), the Senate Report said:

As discussed in connection with subsection (d), each of these factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community. The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

S. Rep. No. 98-225 at 174-75.

In specifically discussing the factors listed in subsections (d) and (e), Congress identified a number of ways in which they would call for a sentence of probation, intermittent confinement, or community service:

- "[S]ubsection (e) specifies that education should be an inappropriate consideration in determining the appropriate length" of a prison term [meaning that lack of education should not be used to determine the length of a prison term], but "the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment." *Id.* at 172-73.
- Similar considerations apply to vocational skills and employment record. *Id.* A "defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service . . . as a condition of probation or supervised release." *Id.* at 173 n.532.
- "The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment." *Id.* at 173.

- “Drug dependence, in the Committee’s view, generally should not play a role in the decision whether or not to incarcerate the offender. However, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for ‘drying out,’ as a condition of probation.” *Id.*
- “Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. . . . Of course, the physical condition of the defendant would play an important role in the determination of conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs.” *Id.*
- “As stated in subsection (c), the Committee believes that [family ties and responsibilities] is generally inappropriate in determining *to sentence a defendant to a term of imprisonment or in determining the length of a term of imprisonment.*” *Id.* at 174 (emphasis supplied). The Commission could conclude “that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family.” *Id.*

Data just published by the Commission shows that over 92% of federal defendants are sentenced to prison (85.3% to straight prison).<sup>89</sup> These defendants are overwhelmingly people of color (70%), poor (87% get no fine imposed), and relatively undereducated (only 6% graduated from college, and half did not graduate from high school); and their crimes are typically victimless (drugs and immigration account for 6 out of 10 convictions). Further, contrary to the perception that guns go with drugs, 83% of federal drug offenses do not involve a firearm. With the exception of crack offenders, drug offenders are usually first offenders. Two-thirds of marijuana defendants are in criminal history category I, as are 60% of heroin and cocaine defendants, and half of methamphetamine defendants. Crack offenders, 82% of whom are African American, are more likely to have criminal history points<sup>90</sup> because they have a higher risk of arrest and prosecution than similarly situated Whites. This data is totally inconsistent with Congress’s intent that probation would be used for offenders who are not dangerous or likely to commit a serious crime in the future, offenders who are in need of services, and first offenders.

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<sup>89</sup> See USSC, Overview of Federal Criminal Cases Fiscal Year 2007 (Dec. 2008), [http://www.ussc.gov/general/20081222\\_Data\\_Overview.pdf](http://www.ussc.gov/general/20081222_Data_Overview.pdf); Changing Face of Federal Criminal Sentencing (Dec. 2008), [http://www.ussc.gov/general/20081230\\_Changing\\_Face\\_Fed\\_Sent.pdf](http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf).

<sup>90</sup> *Id.*

It is also inconsistent with current research. In 1996, Commission staff authored a paper entitled *Sentencing Options under the Guidelines*,<sup>91</sup> which acknowledged that non-prison sentences are associated with less recidivism than prison sentences,<sup>92</sup> that “[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,”<sup>93</sup> and that “alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”<sup>94</sup>

Other research likewise has shown that prison, and the Bureau of Prisons in particular, does not prepare prisoners for successful re-entry and that prison contributes to increased recidivism. For example, Bureau of Prisons research in 1994 concluded that for the 62.3% of federal drug trafficking prisoners who were then in Criminal History Category I, guideline sentences were costly to taxpayers, had little if any incapacitation or deterrent value, and were likely to negatively impact recidivism.<sup>95</sup> See e.g., Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994). “The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.” Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005).<sup>96</sup> The recurring theme at the Sentencing Commission’s Symposium in July 2008 was that lengthy incarceration leads to increased recidivism and is not the most cost effective means of protecting public safety.

**B. The Commission Should Provide Evidence-Based Research on Alternatives to Incarceration.**

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<sup>91</sup> U.S. Sentencing Commission, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996), available at [http://www.rashkind.com/alternatives/dir\\_00/USSC\\_sentencingoptions.pdf](http://www.rashkind.com/alternatives/dir_00/USSC_sentencingoptions.pdf).

<sup>92</sup> *Id.* at 18.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 19.

<sup>95</sup> See also Steve Sady & Lynn Deffebach, *The Need for Full Implementation of Ameliorative Statutes* (June 2008) (demonstrating that BOP has failed to implement existing statutory provisions for treatment and reduced sentences, thus failing to prepare prisoners for re-entry and creating over-incarceration), [http://www.rashkind.com/alternatives/dir\\_04/Sady\\_Over-Incarceration.pdf](http://www.rashkind.com/alternatives/dir_04/Sady_Over-Incarceration.pdf).

<sup>96</sup> Available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

To give guidance to judges, probation officers, and the parties, the Commission should provide, in the Manual or some other easily accessible source, evidence-based research on alternatives to incarceration. "Sound statistical studies on the effectiveness of certain sanctions or treatment programs can be used to increase or decrease use of those particular sentencing alternatives. Recognition of the dimensions of the task is reflected in the extensive powers given the Commission under proposed 28 U.S.C. 995, particularly as they relate to research." See S. Rep. No. 98-225 at 178.

The Commission should make clear that prison is generally not appropriate for first offenders, and that its research is consistent with that result. See *Recidivism and the First Offender* (May 2004).

Extensive evidence shows the efficacy of drug courts as an alternative to incarceration. See, e.g., GAO Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, Feb. 2005 at 72-74 (reviewing the literature and finding that drug courts resulted in net cost savings, in the form of reduced future expenditure by criminal justice agencies and reduced future victimization, with net benefits ranging from about \$1,000 to about \$15,000 per participant, and that the true benefits may be even greater).

Research on mental health treatment would also be helpful, including what kinds of treatment are most effective for different kinds of offenders with different mental health problems.

The Commission should suggest that rehabilitation can be addressed through alternatives to imprisonment based on the factors it has identified as predicting reduced recidivism, such as abstinence from drug use, education, and stable employment. See *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005). Other studies also show that stability, social support, steady employment, and education are essential factors in decreasing recidivism.<sup>97</sup>

### ***III. The Commission Should Eliminate Policy Statements Restricting Consideration of Offender Characteristics and Offense Circumstances.***

The Commission's policy statements either prohibiting or limiting consideration of a broad range of offender characteristics and certain offense characteristics are inconsistent with § 3553(a) and Supreme Court law.

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<sup>97</sup> See R.K. Hanson & K. Morton-Bourgon, *The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies*, Journal of Consulting and Clinical Psychology, Vol. 73(6), 1154 (2005); C.A. Kruttschnitt, C. Uggen & K. Shelton, *Predictors of desistance among sex offenders: The interaction of formal and informal social controls*, Justice Quarterly, Vol. 17(1), 61 (2000); J. Petersilia, *When prisoners come home: Parole and prisoner reentry* (2003).

The judge must now consider all relevant characteristics of the defendant and circumstances of the offense in reaching an appropriate sentence under § 3553(a)(1).<sup>98</sup> The Commission's restrictions on mitigating factors are no longer viable. For example, in *Gall v. United States*, 128 S. Ct. 586 (2007), the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy,<sup>99</sup> or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.<sup>100</sup> *Id.* at 598-602. In approving the sentence and the factors upon which the judge relied, the Court made no mention of the conflicting policy statements.

Further, why the Commission has prohibited and restricted consideration of offender characteristics has never been explained. Congress did not intend it.<sup>101</sup> Nor did Justice Breyer explain it in his account of how the original guidelines were developed.<sup>102</sup> Because the Commission writes rules in the abstract, without the ability to know how a particular offender with particular characteristics should be treated to best advance sentencing purposes, it makes sense that the Commission should not write rules trying to

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<sup>98</sup> See *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring) (Although various factors are "not ordinarily considered under the Guidelines," § 3553(a)(1) "authorizes the sentencing judge to consider" these factors and "an appellate court must consider" them as well).

<sup>99</sup> While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, see USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. See USSG § 5K2.0(d)(2).

<sup>100</sup> See USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5.

<sup>101</sup> Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed and socioeconomic status," 28 U.S.C. § 994(d), and that they reflect the "general inappropriateness of considering education, vocational skills, employment record, family ties and community ties . . . in recommending a term of imprisonment or length of a term of imprisonment." 28 U.S.C. § 994(e). It made perfectly clear that the purpose of these directives was to guard against the inappropriate use of prison to warehouse the disadvantaged, but that these factors should play other roles in the sentencing decision. See S. Rep. No. 98-225 at 171-75 (1983).

<sup>102</sup> Justice Breyer said that the Commissioners debated which offender characteristics should be included in the formal guideline rules and which should be grounds for departure. He said that, based on arguments regarding "fairness" and "uncertainty as to how a judge would actually account for the aggravating and/or mitigating factors," the Commission adopted "offender characteristics rules [that] look primarily to past records of conviction," but "do not take formal account of . . . the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider." See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988).

account for offender characteristic.<sup>103</sup> But this does not explain why the Commission placed offender characteristics off limits for departure or any other purpose, such as choosing the type of sentence. In any event, the Commission's decision to prevent the courts from considering factors that properly constitute grounds for mitigation of the length of a prison sentence or imposition of a non-prison sentence is no longer permissible under the sentencing statute and Supreme Court law.

In light of *Gall*, retaining these policy statements needlessly complicates and confuses the sentencing process. The "departure" language is "obsolete" or has little force.<sup>104</sup> The data show that the rate of "departures" is shrinking. For example, in fiscal year 2004, 5.2% of sentences were non-government-sponsored below-guideline sentences, all of which at the time were downward "departures." See USSC, 2004 Sourcebook, Table 26A. In fiscal year 2008, judges imposed below guideline sentences based on "departures" alone in only 2.1% of cases, on "departures" with *Booker* in another 1.2% of cases, and on grounds that did involve "departures" at all in 9.9% of cases. See USSC, Quarterly Data Report, Table 1 (March 31, 2008). This data tends to show that courts are dispensing with the "departure" analysis even when a "departure" may be warranted. What is worse, some courts still find it permissible to deny a request for an outside-guideline sentence because a policy statement prohibits or discourages departure (or a sentence otherwise outside the guideline range) on the basis of a particular offender characteristic or circumstance of the offense.<sup>105</sup> Some of the policy statements

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<sup>103</sup> As the Commission has said, the guidelines cannot possibly take into account all factors that are relevant to individual sentencing decisions. USSC § 1A1.1, pt. A ¶ 4(b); USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003).

<sup>104</sup> See *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005); *United States v. Mohamed*, 477 F.3d 94 (9th Cir. 2006); *United States v. Toliver*, 183 Fed. Appx. 745 (10th Cir. 2006).

<sup>105</sup> See, e.g., *United States v. Feemster*, 531 F.3d 615, 619-20 (8<sup>th</sup> Cir. 2008) (holding that district court abused its discretion by imposing a variance based on age because the guidelines' policy statement says age is "not ordinarily relevant," relying on a pre-*Gall* opinion which was GVR'd based on *Gall*); *United States v. Carter*, 530 F.3d 565, 577 (7th Cir. 2008) (reversing district court judge who declined to impose a below-guideline sentence based on public service because he had been "put on notice" at a conference on the guidelines that if he "departed" for a reason without basis in the guidelines, Congress would enact mandatory minimums); *United States v. Omole*, 523 F.3d 691, 698-700 (7<sup>th</sup> Cir. 2008) (reversing below-guideline sentence based on defendant's young age (20) and lack of serious involvement with the law, citing pre-*Gall* caselaw for the propositions that a "variant sentence based on factors that are particularized to the individual defendant may be found reasonable, but we are wary of divergent sentences based on characteristics that are common to similarly situated offenders," that "the judge's exercise of discretion . . . represent[s] a disagreement with Congress about the appropriateness of a sentence for a given crime," and that "judges are not allowed to simply ignore the guidelines ranges."); *United States v. Renner*, 281 Fed.Appx. 529 (6<sup>th</sup> Cir. 2008) ("Because Renner's medical condition is not ordinarily a relevant ground for imposing a lower sentence under the Guidelines unless it 'is present to an exceptional degree,' the failure to reduce his sentence on the basis of his health—either sua sponte or through a motion for downward departure—was not an abuse of discretion.").

explicitly foster that misperception by purporting to apply not only to “departures” but to any sentence below the guideline range.<sup>106</sup>

To conform to existing law, we recommend the following specific changes:

- The Commission should delete Chapter 5, Part H (Specific Offender Characteristics) and Part K.2 (Other Grounds for Departure) and move them to a historical note. The restrictions are inconsistent with current law, and the encouraged departures are unduly complicated. It can revise USSG § 1B1.4 to state that the court may not determine the kind or length of the defendant’s sentence “because of” race, sex, national origin, creed, religion or socioeconomic status. *See below.*
- The Commission should retain encouraged “departures” in the Chapter 2 and Chapter 4 guidelines. Because these encourage departure, they are not inconsistent with current law, nor are they unduly complicated. The Commission should delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders. This is inconsistent with current law and the courts are not following it.
- The Commission should revise USSG § 1B1.4 to clarify that the information to be used in imposing sentence applies to determination of “an appropriate sentence . . . within the applicable guideline range, or outside that range,” rather than “within the guideline range, or whether a departure from the guidelines is warranted.” *See below.*
- The Commission should also revise Application Note 1(E) to USSG § 1B1.1 to simplify it and bring it in line with current law and practice. *See below.*

If the Commission is not able to take these steps at the present time, it should act quickly to correct the Manual to reflect that § 3553(b) has been excised and to make clear that departure standards only apply to the question whether to grant a departure, and not to any other consideration in the sentencing decision.<sup>107</sup> Specific language is proposed in Appendix A of the Defenders’ September 8, 2008 Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009.

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<sup>106</sup> *See* USSG, Chapter 5, Part H, Introductory Commentary; USSG §§ 5H1.6, 5K2.0(b), 5K2.0, comment. (n.3(C)); 5K2.10, 5K2.11.

<sup>107</sup> *See, e.g., United States v. Davis*, \_\_ F.3d \_\_, 2008 WL 3288384, at \*6 (6th Cir. 2008) (while true that age is “not ordinarily relevant” under § 5H1.1, the court must consider the “history and characteristics of the defendant” under § 3553(a)(1)); *United States v. Limon*, 273 Fed. Appx. 698 (10th Cir. Apr. 3, 2008) (“Consequently, § 5H1.3 clearly applies to departures and not to a variance under 18 U.S.C. § 3553(a), which is at issue here.”); *United States v. Myers*, 503 F.3d 676, 685-86 (8th Cir. 2007) (upholding variance based on mental condition though departure not warranted under §5K2.13).

§1B1.1. Application Instructions

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Commentary

Application Notes:

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E) "Departure" means (i) for purposes of the provisions of the Guidelines Manual other than §4A1.3 (Departures Based on Inadequacy of Criminal History Category), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3, assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.

"Downward departure" means departure that effects a sentence less than the sentence recommended by the applicable guideline range. "Depart downward" means grant a downward departure.

"Upward departure" means departure that effects a sentence greater than the sentence recommended by the applicable guideline range. "Depart upward" means grant an upward departure.

§1B1.4. Information to be Used in Imposing Sentence

(a) In determining an appropriate sentence to impose within the applicable guideline range, or outside that range, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

(b) Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status. The court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion or socioeconomic status.

Commentary

Application Notes:

1. Subsection (a) distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in

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imposing sentence within or outside that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to impose a sentence outside the guideline range. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for a sentence above the guideline range. Some policy statements do, however, express a Commission policy that certain factors are not relevant or not ordinarily relevant for purposes of departure. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

**Deleted:** depart from the guidelines

**Deleted:** an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics)

2. Subsection (b) restates former policy statement 5H1.10. It makes clear that the court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion, or socioeconomic status. Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." See 28 U.S.C. § 994(d). The purpose of this directive was to make clear that it would be inappropriate "to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." See S. Rep. No. 98-225 at 171 (1983). "Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, [the Senate Judiciary] Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training." Id. at 171 n.531.

#### **IV. The Commission Should Revise USSG § 6A1.3 to Ensure Reliable Factfinding.**

First, the Commission should delete the last paragraph of the commentary stating that the Commission believes that a preponderance of the evidence standard satisfies due process. Only the courts are authorized to announce constitutional standards for criminal procedure, and the Sentencing Reform Act did nothing to change that.<sup>108</sup> The Eighth and Ninth Circuits have held that a preponderance of the evidence standard is not adequate when the finding would have a disproportionate impact on the guideline range.

<sup>108</sup> The Sentencing Reform Act "does not authorize the Commission to prescribe procedural rules." See Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary at 432, reprinted in Hutchison & Yellen, *Federal Sentencing Law & Procedure*, Appendix 8 (1989).

Surely the Commission exceeds its authority in issuing a policy statement which conflicts with the law of two courts of appeals on a matter of criminal procedure. If the Commission retains any policy statement about the standard of proof, it should note that a higher standard of proof for increases that have a disproportionate effect on the guideline range may be appropriate, citing *United States v. Gonzalez*, 492 F.3d 1031 (9th Cir. 2007); *United States v. Staten*, 466 F.3d 708 (9th Cir. 2005); *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001); *United States v. Charlesworth*, 217 F.3d 1155, 1158 (9th Cir. 2000); *United States v. Hopper*, 177 F.3d 824 (1999); *United States v. Garth*, 540 F.3d 766 (8th Cir. 2008); *United States v. Calva*, 979 F.2d 119, 122 (8th Cir.1992); *United States v. Bradford*, 499 F.3d 910, 919 (8th Cir.2007); *United States v. Matthews*, 29 F.3d 462, 464 (8th Cir.1994); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir.1991).

Second, the “sufficient indicia of probable accuracy” standard should be removed from the policy statement itself, and from the second paragraph of the commentary, because it comes from the pre-guidelines era when factual accuracy was of very little moment. The “probable accuracy” standard first appeared in the guidelines in 1987, where it was quoted directly from a 1981, pre-guidelines, district court case. See 52 Fed. Reg. 18,046, 18,054 (May 13, 1987) (quoting *United States v. Marshall*, 519 F.Supp.751 (D. Wis. 1981), *aff’d*, 719 F.2d 887 (7th Cir. 1983)). While the commentary cites *United States v. Watts*, 519 U.S. 148, 157 (1997), for the proposition that “[a]ny information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy,” this proposition does not in fact appear in *Watts*.

In the pre-guidelines era, the judge was not required to find or give any weight to any facts in imposing sentence, and could impose sentence “giving no reason at all.” *Williams v. New York*, 337 U.S. 241, 248-49, 252 (1949). In *Williams* itself, the defendant did not attempt to challenge the accuracy of the allegations or ask the judge to disregard them. *Id.* at 244. In that context, the Supreme Court held that a judge could rely on “out-of-court” sources without offending due process. *Id.* at 248, 252. We now have a system in which the guidelines, while advisory, must still be calculated and considered. The relevant facts in support of any sentence must undergo thorough adversarial testing and judges must give reasons for their sentences, whether inside or outside the guideline range. Whether or not this is required by due process, it is sound practice according to the Supreme Court, Rule 32 and § 3553(c). See *Rita*, 127 S. Ct. at 2465, 2468-69; *Irizarry*, 128 S. Ct. at 2203-04. The “sufficient indicia of probable accuracy” standard is inconsistent with current law.

Third, the first paragraph of the commentary should be updated to include relevant principles from *Rita*, *Irizarry*, and circuit caselaw correctly applying those decisions. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (“the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure”); *Irizarry v. United States*, 553 U.S. \_\_\_, 128 S. Ct. 2198, 2203-04 (2008) (the court should “withhold [its] judgment until after the parties have had a full opportunity to present their evidence and their arguments,” and “make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.”). See also, e.g., *United States v. Pena-Hermosillo*,

522 F.3d 1108, 1116 (10th Cir. 2008) (parties must be given an “adequate” opportunity to present relevant information to the court,” and holding that it was an abuse of discretion to decide a disputed question of fact against a party without giving that party an opportunity to present evidence on the issue, citing *Rita*); *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) (courts must subject each sentence to thorough adversarial testing and must give reasons for the sentence, citing *Rita*); *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008) (district court erred in “failing to provide Warr with any notice whatsoever before relying on [a recidivism] study” and “should have notified Warr of it before the sentencing hearing,” because the study “amounted to relevant and factual information” and was “[o]ne of the reasons the district court sentenced Warr to a term well beyond the guidelines range,” citing *Irizarry*).

Fourth, cases that are outdated and/or do not stand for the propositions for which they are cited should be removed from the second paragraph of the commentary. This paragraph relies heavily on *Watts*, *Witte v. United States*, 515 U.S. 389 (1995), and *Nichols v. United States*, 511 U.S. 738 (1994), for the general proposition that courts may rely on information without regard to admissibility and without procedural protections. That was not the holding of any of these cases. To the extent they mentioned lax procedural principles that were “traditionally” allowed, they cited the pre-guidelines *Williams* case. The commentary mis-cites these cases in support of applying a pre-guidelines procedural regime in a post-guidelines era. They should be deleted.

*Watts* and *Witte* should be removed because they simply do not stand for any proposition affecting procedural fairness or accuracy in the resolution of disputed facts, the topic addressed by this policy statement. The majority in *Booker* emphasized that both cases were decided under the Double Jeopardy Clause, and that “*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument.” *Booker*, 543 U.S. at 240 & n.4.

*Watts*, 519 U.S. at 154 is also cited for the proposition that the “lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct.” This is inaccurate. The Court did not hold that acquitted conduct could be used at sentencing *because* of the preponderance standard, nor did it issue any holding regarding the preponderance standard. The Court noted that the *guidelines* state that the preponderance standard is appropriate, that the Court itself had held that the preponderance standard generally satisfies due process *in other contexts*, that there was a divergence of opinion on this among the circuits in cases under the guidelines, and that it was not addressing the issue. *Id.* at 156-57. As Justice Breyer accurately described it, the guidelines’ treatment of acquitted conduct merely “rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions.” *Watts*, 519 U.S. at 159 (Breyer, J., concurring). To say that it is possible to reach different results depending on the standard of proof is quite different from saying that the “lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct.” (emphasis supplied)

*V. The Commission Should Support Amendments to Fed. R. Crim. P. 32 To Improve Fairness and Accuracy in Sentencing.*

*A. Disclosure of Documentary Information*

In some districts (including the Eastern District of North Carolina and the Northern District of Georgia), probation officers include in the pre-sentence report factual assertions based on documents obtained from the government or from a non-party, such as law enforcement reports or letters from victims, which defense counsel is unable to obtain and therefore unable to effectively rebut. In other districts, disclosure is either standard practice or required by local rules. Disclosure has improved fairness and efficiency, and has caused no problems to anyone. Disclosure should be required in every case, to ensure that every defendant has the ability to address the reliability of the information upon which he is being sentenced and to avoid hidden and unwarranted disparity.

The Federal Public and Community Defenders therefore support, and ask the Commission to support, a change to Fed. R. Crim. P. 32 as follows:

1. Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer.
2. Where documentary information is submitted by a non-party to the probation officer in connection with a pre-sentence investigation, the officer shall, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties.

The Criminal Rules Advisory Committee is presently considering such an amendment, which has been endorsed by the American Bar Association and the Constitution Project's blue-ribbon panel on sentencing reform. The Defenders do not support the portion of that proposal that would apply a similar requirement to oral information. The presentence report already contains a summary of oral information, and we believe that any additional requirement as to oral information would be too burdensome for probation officers and the parties.

DOJ's Alternative Proposal. The Defenders oppose, and believe the Commission should oppose, an alternative proposed by the Department of Justice which would require the "probation officer," "[u]pon request of either party," "to disclose the underlying basis of any material information contained in the report, unless such disclosure might endanger any person or disclose personal or confidential information about a victim, or there is otherwise good cause."

The Department's proposal is an unacceptable substitute for the ABA/Constitution Project's proposal for a variety of reasons. Rather than requiring automatic disclosure of "documentary information," it would embroil probation officers in discovery battles over vaguely defined terms, and result in delays and extra work. What is worse, important documentary information would not be disclosed at all, thus perpetuating the problem of probation officers considering information from the government and victims that defense counsel may never learn.

First, the terms are vague at best and designed to avoid disclosure. What do "underlying basis," "material information," "might endanger" any person, "personal," or "confidential" mean? Who decides? The probation officer? The government or a victim through instructions to the probation officer? In fact, the "might endanger" language would be used to deny information from informants and family members. Information from victims would always be deemed "personal or confidential." The defendant has no similar protection against disclosure to the government. The purpose of the ABA/Constitution Project's proposal would be defeated.

Second, how would the rule be enforced? It does not say that the probation officer must disclose that she intends to withhold some part of the "underlying basis" or her reason for doing so. If not, there is no opportunity to file a motion to compel.

Third, the proposal would cause delay and create extra burden on all concerned. Within the two weeks between disclosure of the draft PSR and filing of objections, the parties would have to discern which "underlying bases" they needed to request, make the request, and, even assuming all went smoothly, it might be disclosed a week later, leaving one week to investigate the information and write the objections. This would frequently not be enough time, and sentencing would have to be delayed. If disclosure was refused, a motion would have to be filed and heard, and sentencing postponed. Further, the proposal is not limited to documentary information, and so would apply to oral information as well, thus creating additional burden for probation officers and litigation opportunities for the parties.

#### ***B. Probation Officer's Recommendation***

Rule 32(e)(3) should be revised to require that the probation officer's recommendation be disclosed in every case, absent good cause shown. As amended in 1994, the Rule establishes a "presumption that a probation officer's sentencing recommendation be disclosed to the parties," *see* 154 F.R.D. 433, 461 (1994), but it still permits the court to direct the probation officer, by local rule or by order in a case, not to disclose the recommendation to anyone other than the court. *See* Fed. R. Crim. P. 32(e)(3). This has resulted in widely disparate practices. For example, the recommendation is disclosed in neither the Northern District of Georgia nor the Eastern District of North Carolina, yet it is disclosed in the Middle District of North Carolina, as well as many other districts. In the District of Arizona, the recommendation is disclosed with both the draft and final pre-sentence report, and this has caused no problem, despite the heavy caseload. Disclosure should be the rule in all districts.

The recommendation contains both a “recommendation” as to the length and conditions of sentence and a “justification” consisting of factual allegations, legal interpretation, and subjective opinions. As described by U.S. Probation:

The sentencing recommendation and justification are critical components of the presentence report. The process of making a recommendation begins with a careful assessment of all of the facts pertaining to the defendant and the case, followed by a determination, based on the applicable statutes and guidelines, as to what the officer believes to be an appropriate sentence. The justification is the officer’s explanation of the facts and laws that shaped the recommendation.

*Publication 107* at II-70, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005. In addition to “facts and laws,” this “explanation” may include the probation officer’s opinion on such matters as whether the defendant has “been cooperative,” what his “attitude toward the system” is, and whether there are “positive or negative influences” in his support network. *Id.* at II-72-73.

Judges generally follow the probation officer’s recommendation. See Stephen A. Fannell and William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1617 (1980). Depriving the defendant of the opportunity to challenge the probation officer’s conclusion, supporting facts, legal analysis, and subjective opinions is fundamentally unfair to the defendant and deprives the court of accurate information. See, e.g., *United States v. Christman*, 509 F.3d 299 (6<sup>th</sup> Cir. 2007) (vacating and remanding for re-sentencing where judge relied on probation officer’s undisclosed belief, contrary to information disclosed in the pre-sentence report, that defendant had molested children); *United States v. Baldrich*, 471 F.3d 1110 (9<sup>th</sup> Cir. 2006) (affirming because judge did not credit officer’s belief that defendant was a “danger,” and noting that analysis and opinions should be disclosed); *United States v. Duley*, 2007 WL 752167 (D. Utah Mar. 07, 2007) (court disclosed to the defendant the fact and substance of probation officer’s conversation with defendant regarding medical condition without counsel present).

Changes in probation practices have obviated the original justification for withholding the recommendation. The policy that the recommendation “should not be disclosed” originated at a time when the officer who wrote the report was the same officer who supervised the defendant, and it was thought that disclosure “may impair the effectiveness” of the supervisory relationship. See Fed. R. Crim. P. 32, 1974 advisory committee’s note. After the guidelines went into effect, however, some probation officers began specializing in the writing of pre-sentence reports and others focused on case management. As the number of defendants sentenced to prison greatly increased under the guidelines, the smooth transition between sentencing and supervision became less important. At the same time, the complexity of the guidelines created a need for officers who would focus solely on writing pre-sentence reports. Further, as the Judicial

Conference foretold in 1989, Rule 32's provision that the recommendation need not be disclosed "may well create tensions when juxtaposed with other requirements of the Sentencing Reform Act," *i.e.*, the nature of the recommendation may be relevant if it affected the guideline determination and/or was indicative of bias. See Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary at 437, reprinted in Hutchison & Yellen, *Federal Sentencing Law & Procedure*, Appendix 8 (1989).

**C. DOJ's Proposal to Require Written Notice of Bases for Departure or Variance to be Filed with Objections to PSR**

DOJ has proposed a rule change that would require the parties to provide written notice of "any basis for departure or sentence otherwise outside the guideline range" as part of objections to the pre-sentence report.

The Defenders oppose this proposed change because it would be unworkable, unfair, and is unnecessary. The final pre-sentence report is generally not disclosed until seven days before sentencing. We usually do not file sentencing memoranda, or provide grounds for a sentence outside the guideline range, until receiving the final report, because the arguments often cannot be known or made until the guideline application issues and factual disputes are resolved. Further, probation officers sometimes disclose the report less than seven days before sentencing. And sometimes a basis for a sentence outside the guideline range is not known until even closer to sentencing.

DOJ's proposal would create new battles over what is and is not proper notice, with the parties (most often the government) seeking to have grounds for a sentence outside the guideline range deemed waived, and raising this as an issue on appeal. The possibility of depriving a defendant of a sentencing argument should not be encouraged by the rule. We understand that a few districts have local rules to this effect, which only force the defense to file boilerplate notice stating that they may move for a sentence outside the guideline range based on § 3553(a) to protect against claims of waiver.

The solution to DOJ's concern about notice is simple. If any new facts are raised for the first time at sentencing, the judge should grant "a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial." *Irizarry v. United States*, 128 S. Ct. 2198, 2203 (2008).

*Lyle Yurko*  
*Charlotte, NC*

Mr. Yurko received his undergraduate education at the University of North Carolina in Chapel Hill, majoring in political science and graduating with honors in history. He interrupted his studies twice. First, he worked for then Minority United States Senate Whip Robert Griffin of Michigan in 1968, and second, he was employed as a Technical Representative to the Pentagon in 1970 when he traveled to Asia as an advisor to the Marine Corp during the Vietnam War.

Mr. Yurko studied law at Loyola University in New Orleans was a member of the Law Review. For more than thirty years, Mr. Yurko has practiced law in the Federal Courts of the United States. Mr. Yurko began serving as a member of the Practitioners Advisory Group to the United States Sentencing Commission in 1990. His involvement in national sentencing policy led to his appointment by the Chief Justice of North Carolina to the North Carolina Sentencing Commission in 1993. He served continuously until 2007. He was one of the Architects of North Carolina's Structured Sentencing Reform Law which received the Excellence in Government Award from the John F. Kennedy school of Government at Harvard and the Ford Foundation in 1997.

## **WRITTEN TESTIMONY: LYLE J. YURKO\***

It was a great honor to have been asked to provide testimony to the United States Sentencing Commission regarding the Twenty-Fifth Anniversary of Sentencing Reform in the United States. I consider my involvement in Sentencing Reform both in Washington and North Carolina as one of the highlights of my career as a practitioner because of the profound impact that both Commissions have had on public policy in America.

It is my sincere opinion that the 1984 Sentencing Reform Act has led to vast improvements in the quality of sentencing justice in America. However, just as the revolution which gave birth to America in 1776 created a more perfect union that continues as a noble experiment which is still being perfected, so too did the Reform Act create a more perfect system of sentencing justice which is still being perfected. What follows are my beliefs regarding the strengths and weakness of sentencing reform in the federal system of justice.

### **Truth in Sentencing**

By far the most important provision of the Reform Act was the abolition of the flawed system of parole that existed prior to its passage. That system was disparate, troublesomely complex, and misleading. It was my privilege to personally work with one of the giant thinkers in America on the federal system of sentencing, Dr. Martin Groder. Dr. Groder was the Chief of the Forensic Psychiatric

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\* Legal Practitioner 1976 - Present; Member, Practitioners Advisory Group, United States Sentencing Commission 1990-Present ; Commissioner, North Carolina Sentencing Commission, 1994 - 2007.

Unit at Marion; planned and initially executed the Forensic Unit at Butner; then was a Professor of Psychiatry at Duke University Medical School. I used Dr. Groder as an expert witness in 1979 and thus became more familiar with his published writings pertaining to Federal Sentencing.

Dr. Groder's analysis of the then existing parole system was in his frank words, "a tripartite con game". The system was conning the inmates into believing that if they behaved they would attain early release; the inmates were conning the system that they had been truly reformed; and both were conning the public that rehabilitation was occurring despite significant recidivism. Dr. Groder again frankly wrote that "if you put a sign in front of every federal prison that proclaimed "we rehabilitate" "it would be fraud".

Now, with truth in sentencing, the judge, the defendant, the prosecutor, the defense attorney, the probation officer, the victim, and most importantly the public knows exactly what a five year sentence means. This is a more honest and transparent system which promotes the purposes of punishment articulated in 3553(a). However, the harshness which sometimes accompanies truth in sentencing is at times, unnecessary, wasteful of precious resources, and in the extreme cases, violates due process in my opinion. More reform is needed.

### **Rational Sentencing**

The creation of a rationally based system of punishment, theoretically designed to increase severity as conduct which brings a defendant into the federal system is more severe is also a vast improvement over the prior totally discretionary system limited only by the statutory maximums. That system was disproportionate, irrational, and biased.

However, the "relevant conduct" segment of the guidelines still has significant flaws in my opinion. It is complex, unevenly applied, and the effort to punish uncharged, and even acquitted conduct, in my opinion, violates due process. I believe the Commission should conduct a comprehensive review of relevant conduct in an effort to simplify its provisions and applications, clarify its scope and completely abolish the practice of punishment of uncharged or acquitted conduct. Less disparity, a goal of reform, can be accomplished but will be a daunting task which will increase the complexity and cost of criminal justice in the federal system but such a price is consistent with principles of fairness and decency.

### **Economic Offenses**

One of the major post-reform act improvements in just sentencing were the changes to the guidelines regarding economic crimes completed by 2001. These were, in my opinion, necessary and proper.

These dramatic changes, put into effect before many of the spectacular frauds were detected in the early 21st century, went largely unnoticed by the press and the public. The serious increases in punishment for truly egregious behavior are, in my opinion, in furtherance of the goals of sentencing articulated in 3553(a). Perhaps if these changes had been more closely scrutinized by the public and press they would have had a more significant deterrence effect. The Commission is to be lauded for these reforms. However, the economic guidelines, in my opinion, should be continuously monitored by the Commission, with an eye toward simplification when possible to promote less disparity in their application. There are times when specific offense characteristics and adjustments work in tandem to cummulatively result in over punishment. Some mechanism should be in place to limit such results.

Likewise, the press should be informed of the serious penalties applicable to truly egregious economic offenses so as to promote deterrence and public respect for the federal justice system.

### **Preliminary Conclusions**

Truth in sentencing, rational sentencing and a more comprehensive systematic scheme of punishment for economic offenses, including money laundering, in my opinion, are the strengths of sentencing reform to date. What follows are what I consider to be the weaknesses.

### **Mandatory Minimums**

The duality of a guidelines system of punishment which exists along with congressionally created statutory mandatory minimums is the chief flaw of sentencing reform, in my opinion.

In the early 1990's, the Commission issued a comprehensive report to Congress regarding the conflict between the guidelines system and mandatory minimums. Thereafter, testimony was given by then Chairman Wilkens and others before the Judiciary Committee of the United States Senate. The report and the hearings should have caused the Congress to eliminate all the mandatory minimums which exist in the federal system. Unfortunately it did not. Congress's inaction on such a critical reform did not make it subject to a postlogue in President Kennedy's book "Profiles in Courage". Abolition of mandatories might not prove politically popular but is a necessary requirement if the goal of punishment is true justice.

Statutory mandatory minimums, co-existent with the guidelines, are flawed because mandatories usually rely on a single factor to achieve punishment while the guidelines are multifaceted and rationally based.

The mandatories have significantly skewed the punishment regime regarding controlled substance violations because of these isolated factor principles and because the Commission felt obligated to ground the anti-drug punishment regime in the mandatories. This results in both under punishment and over punishment of drug offenders.

A comprehensive system of punishment for drug perpetrators could be created if the mandatories were abolished so that rationality dictates sentencing results.

A graduated systematic regime which factors both aggravating and mitigating circumstances would be more consistent with 3553(a). The mandatories rely on only two factors, drug quantity and criminal history. While these factors are significant, a system which also properly considers violence, weapons, international narcotics trafficking, distributions to users who are minors, pregnant, or challenged, criminal organization and other aggravaters, while at the same time, also properly considers mitigation would be a vast improvement over the current regime.

Now, a significant perpetrator who has two prior felony convictions for substance violation, is encouraged by the system to engage in violence or other activities which may avoid detection because he must receive a life sentence even if his conduct is not otherwise aggravated. Such a system is, in my opinion, irrational. Also, a life sentence is totally inappropriate for a more minor offender who has two prior drug felonies which may be even more minor than the federal conduct being prosecuted. Such a

result wastes tax dollars, is unjust and in my opinion violates due process.

The soundest public policy change for the Commission to advocate would be Congressional elimination of mandatory minimums, after a carefully designed restructuring of the drug guidelines is effectuated. This would demonstrate to the Congress the alternative that would be in place if they abolished the mandatory minimums so as to make abolition more politically practicable. Addressing this issue is neither a liberal or conservative agenda issue but simply is in the interest of justice.

Judge Wilkens, a true judicial giant and a true conservative, is to be commended for his early warning regarding the flaws in the duality of mandatories coupled with the guidelines. The time is long overdue to follow his leadership on this critical issue, in my opinion.

### Crack

Attached hereto is an article, soon to be published, which I have authored that I believe provides a comprehensive analysis of the unconscionable disparity which exists because of the 100 to 1 crack-powder ratio. The Commission is to be commended for its multiple reports to Congress which comprehensively outlined the crack/powder dilemma. The only just remedy is for Congress to immediately eliminate the crack/powder disparity.

### 5k1.1

The most disparity still existent in the federal justice system occurs because of the current practices associated with the 5k process. I believe 5k should be completely reformed after a

comprehensive review is conducted by the Commission with full input from all participants in the federal system.

### Fast Track

Eliminate this program or make it applicable to all Judicial Districts. Its uneven applicability, while expedient, promotes disparity particularly towards Hispanic offenders which I believe thwarts equal protection.

### Transparency

It is profoundly trying to accept an appointment to this Commission while at the same time pursuing public service as a member of the bench, bar or other profession. I know first hand this difficulty because I served as a State Sentencing Commissioner while practicing law and while being an active member of PAG.

However, during my tenure on the 28-member North Carolina Commission we only had one private meeting over the course of thirteen years. This was held to choose a new executive director.

There are certainly times when, for reasons of national security or otherwise, private meetings are in the public interest. But I believe transparency is a necessary element of public policy. This former Commissioner understands why some meetings must be conducted in private, but as President Obama has made transparency a priority of his administration, surely more of the Commission's business could and should be subject to public scrutiny when practicable.

### **An Ex-Officio Commissioner Who is a Practitioner**

I believe it was a flaw of sentencing reform to include a Representative of the Department of Justice as an ex-officio member of the Commission without the counterbalance of having a Practitioner also as an ex-officio member. Balanced guidance by true professionals who prosecute and defend would promote sentencing reform.

### **Secondary Conclusions**

Mandatory minimums, 5k, crack/powder, fast track, transparency, and a practitioner as a Commission member are all areas where more perfection could be achieved in the sentencing reform process.

### **Booker**

As I testified on February 16, 2005, "I truly believe that the new advisory system fashioned by Justice Breyer preserves this Commission's dedicated 17 (now 22) year odyssey towards the creation of just and fair sentencing reform. This new system, I believe, if allowed to flourish, will promote uniformity, while at the same time, diminish the occasional irrational results required by any mandatory guidelines system."

A comprehensive review of the post-Booker era, I believe, fully supports my testimony.

The bench imposes sentences at variance with the guidelines in only a small minority of cases. Most variances are carefully grounded in the principles set forth in 3553(a). To allow the tiny number of variances which are not adequately so grounded to foster any recreation of a mandatory guidelines system would, I believe, be a travesty. Booker was the Maubury v. Madison, of sentencing reform. My opinion is that its wisdom should be preserved and appellate reversals should occur with appropriate restraint.

### **Conclusion**

While maintaining its place as this "shining city on a hill", America has also endured slavery, a civil war, prohibition, racial segregation, McCarthy, and other less illuminated experiences. So it is with sentencing reform. Continued professional diligence which has been the hallmark of this Commission can lead to a more perfect union. May that journey endure.

# EXHIBIT

## A

**PUNISHMENT FOR CRACK AND POWDER COCAINE:**  
**WILFULL BLINDNESS TO RACISM**  
**AND CRIMINAL JUSTICE**

In 1984, the Congress passed and the President signed the United States Sentencing Reform Act which established the Sentencing Commission granting it broad but guided authority over sentencing policy in the Federal Courts. The purposes of the Act were to establish truth in sentencing by abolishing parole and limiting "good time" credit to 52 days per year; to create a rational modified real offense system of sentencing where punishment was largely based on the seriousness of the offense and the criminal history of the offenders and to eliminate unwarranted sentencing disparity so that similarly situated offenders will receive sentences that are not disproportionate. The act tasked the commission it established with promulgating sentencing guidelines based on these objectives and on November 1, 1987 these guidelines became effective. The Commission decided that offense seriousness would largely be gauged by violence, the degree of monetary loss or the amount of controlled substances, seriousness also proportionately calculated in relationship to the addictive qualities of a given substance.

In 1986, CBS-TV anchor Dan Rather produced and narrated a documentary entitled 48 Hours on Crack Street (the precursor to the series "48 Hours"). This documentary was almost exclusively based on anecdotal reports of users of cocaine base, a form of cocaine ingested by smoking the substance. "Crack" is converted from powdered cocaine by mixing it with baking soda and heating the mixture. The end product - crack is a smokable form of the significantly addictive Schedule II Controlled Substance, cocaine.

Rather's documentary alleged that crack was far more addictive than powder cocaine, was

responsible for producing “crack babies,” brain injured infants whose mothers had used crack during pregnancy, and among other claims, that crack use and distribution was associated with violent behavior.

Almost immediately after the airing of this documentary, members of Congress began to introduce bills designed to significantly increase the federal penalties for cocaine possession and distribution. On the floor of the House, members engaged in a biding war attempting to “out tough on crime” each other to the point that Representative Rangel (D) of New York proposed that the mandatory minimum for crack be 100 times greater than the minimum penalty for powder cocaine. Thus this measure, which won both Congressional approval and was signed into law by the President, created a 5 year mandatory minimum for 5 grams of crack and for 500 grams of powder and set a 10 year mandatory minimum for 50 grams of crack and 5000 grams of powder cocaine (5 kilograms). The absurdity of this legislation was that cocaine base cannot be produced without powder cocaine and thus major dealers in powder receive lower sentences than street crack dealers.

The mandatory minimum 100 to 1 ratio was compounded by the Sentencing Commission who promulgated the drug guidelines by tying the penalties to the mandatory minimum so that the guidelines for 50 grams of crack was the same level 32 as 5000 grams of powder. A powder dealer who sells 160 kilograms of cocaine actually receives a lower sentence than a crack dealer who sells 2 kilos even though 100 kilos of powder will be manufactured into about 120 kilos of crack potentially. Rational sentencing policy was not promoted by these decisions of Congress and the Commission.

But as the Commission began compiling statistics on the effect of a national guidelines system, a truly troubling aspect of the crack/powder distinction emerged. By 1995, 88% of those in federal prison for crack distribution were African Americans. 75% of the powder inmates were not African

Americans. As a result of this disparity, the Commission, pursuant to their statutory mandates, began a public study of crack and powder sentencing. At public hearings, scientific experts and other policy makers including this author presented startling evidence. The evidence conclusively established that Dan Rather's crack street documentary was totally fallacious. Crack and powder are equally addictive, crack babies do not exist, the violence associated with the distribution of cocaine of either type is not as significant as thought and crack distributors possess firearms in 25% of the cases prosecuted while powder defendants possess guns in 15% of the cases. The conclusion by overwhelming evidence was that the 100 to 1 ratio was fostering racial disparity and that there was no rational basis for this disparity. Thus, the Commission amended the guidelines to a 1 to 1 ratio and recommended to Congress that the mandatory minimum be likewise equated.

The authors of the sentencing reform act skillfully and largely successfully have removed politics from federal sentencing policy. Unlike other matters, the Sentencing Commission proposes changes in the guidelines and unless Congress nullifies the change the Amendment becomes law in six months. History has shown that absent a declaration of war it is rare for any bill to pass both Houses of Congress in six months and many political scientist believe this built-in delay is one of the geniuses of our constitutional democracy. Laws that are debated in slow and rational deliberation tend to be laws that are passed with wisdom. The de-politicization of sentencing policy has resulted in more than 700 amendments to the guidelines being enacted. Only two amendments have been rejected. One of them was the one to one crack ratio.

In 2002, the Sentencing Commission again, deeply troubled by this continuing sentencing disparity, held public hearings on the crack/powder dichotomy. The government had tentatively agreed to a 20 to 1 ratio and the year long process of study appeared to be headed for unanimous Commission

approval without Congressional nullification. Then on the last day of the public hearings, the Government voiced their rejection of the compromise. The manner in which this rejection was presented was truly embarrassing. The Attorney General sent his deputy from the Civil Division. Mr. Thompson is a brilliant legal scholar but his testimony and answers to Commission questioning showed that he knew very little about the crack/powder issue. Some of us present believed that the only reason he was presenting this paper authored by the Criminal Division of Main Justice was because he was an African-American.

The Sentencing Commission was outraged by the last-minute rug pulling by Main Justice but realized that without the full support of the Executive, the amendment would be rejected by Congress. However, in no mood to placate a Justice Department which had betrayed the Commission, the Commission refused to pass a Justice initiated modification to §3E1.1(b).

Not content with the Commission's action, the Justice Department found a friend in Congressman Feeney who attached an Amendment to the Amber Alert legislation during a late evening session of the House. The so-called "Feeney Amendment" not only required the Commission to modify 3E1.1(b), but contained multiple limiting provisions to the guidelines restricting judicial discretion. The coup de gras was a provision requiring Chief District Court Federal Judges to file annual reports with Congress detailing the departure rates of all of the Judges in the District. This version of McCarthy type "black-listing" was greeted with significant ranker by members of the federal bench and by members of the United States Supreme Court. Several legal scholars have concluded that the "Feeney" controversy played a significant role in the Booker decision which determined that the mandatory guidelines violated the United States Constitution.

In 2007, the Commission, which was still significantly concerned about the sentencing disparity between crack and powder cocaine, again produced a study, held public hearings and proposed a modest 2-level reduction in sentencing for defendants who distribute cocaine base. On November 1, 2007, this Amendment became law and in December, the Commission decided to make this change retroactive, over the strong objection of the Government. A significant factor in the rarely used retroactivity section of the guidelines was the historical context of the crack powder disparity and Congresses repeated willful blindness to multiple reports calling on Congress to remedy this disparity based on race.

The Department of Justice fought hard to get congress to reject the retroactive effect of the "crack" Amendment, They were not successful.

As many as 200,000 inmates now can ask the Courts to reduce their sentences. Some Judicial Districts are reducing sentences whenever asked but others have continued to engage in foot dragging and obfuscation. Equal justice has suffered recreating the disparity that the guidelines were designed to eliminate. Progress proceeds slowly up to today.

The only sure cure to racial disparity would be to make crack and powder cocaine sentencing equal and to make such a change retroactive.

The congress should abolish the inane mandatory minimums so that all defendants, the corporate criminal and the street drug dealer would be sentenced only by the guidelines and a fair and impartial judge. Justice would then be truly color blind.

Perhaps the Obama Presidency can urge these changes. But the road to change is not sure and

swift. The forces of tyranny are tough but in the end, we the American people will reach the promise land.

*David Oscar Markus*  
*Criminal Justice Act Panelist*  
*District Representative S.D. Fla.*

David Oscar Markus is a magna cum laude graduate of Harvard Law School. After graduating from Harvard, Mr. Markus served as law clerk to the Honorable Edward B. Davis, then-Chief United States District Judge, Southern District of Florida. Following his clerkship, Mr. Markus worked as an associate at Williams & Connolly in Washington, D.C., and then practiced as an Assistant Federal Public Defender in Miami. He is now in private practice focusing on criminal trials and appeals.

Mr. Markus is the past-president of the Florida Association of Criminal Defense Lawyers--Miami Chapter and the past-president of Federal Bar Association-South Florida Chapter. He is the Southern District of Florida's national representative for the Criminal Justice Act Panel, and is the Eleventh Circuit representative on the Defender Services Advisory Group. Mr. Markus is the vice-chair of the National Association of Criminal Defense Lawyer's amicus committee.

Mr. Markus has lectured on different aspects of the criminal trial and appeal and has taught at the University of Miami School of Law and at Florida International University College of Law.

**Testimony of  
DAVID OSCAR MARKUS, ESQ.<sup>1</sup>  
Before the United States Sentencing Commission  
Public Hearing regarding  
the 25th anniversary of the passage of the Sentencing Reform Act of 1984  
"View from Sentencing Practitioners"**

*"Trial by jury [is] the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." – Thomas Jefferson*

I wish to thank the United States Sentencing Commission for holding this hearing and for the opportunity to testify regarding the Sentencing Reform Act.

Since the advent of the Sentencing Reform Act, there are more prosecutors. More probation officers. More prosecutions. More jails. More defendants. More public defenders. More lengthy sentences.

Certainly then, there must be more trials.

No -- in fact, there are far fewer trials now, 25 years after the Sentencing Reform Act became law.

**I.     *The problem.***

When the guidelines were first enacted, many predicted that the harsh guidelines would cause an explosion in trials. In fact, the harshness of the guidelines has caused an explosion in guilty pleas – even among defendants who would otherwise have been acquitted had they proceeded to trial.<sup>2</sup>

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<sup>1</sup>David Oscar Markus is a criminal defense lawyer in Miami, Florida and a former assistant federal defender. He is the Criminal Justice Act representative for the Southern District of Florida and serves as the Eleventh Circuit representative on the Defender Services Advisory Group. He is a vice-chair on the Eleventh Circuit amicus committee for the National Association of Criminal Defense Lawyers.

<sup>2</sup>Wright, Ronald F., "Trial Distortion and the End of Innocence in Federal Criminal Justice," 154 U. Pa. L. Rev. 79-154 (2005) ("The increased guilty plea rates of

When the SRA was passed, there were approximately 30,000 defendants. In 2007, there were about 88,000. When the SRA was passed, there were approximately 6,500 trials – or about 18% of cases proceeded to trial. In 2007, there were 3414 trials – or about 3.7% of cases proceeded to trial.<sup>3</sup>

Although the initial predictions about the effect of the guidelines were wrong, it should come as no surprise now that defendants – even innocent defendants – will do just about anything to avoid trial as the risks of proceeding to trial are simply too great. “Sentences for defendants convicted after trial are 500% longer than sentences received by those who plead guilty and cooperate with the government.” *Berthoff v. United States*, 140 F. Supp. 2d 50, 67-68 (D. Mass. 2001).<sup>4</sup>

This trial penalty should cause all criminal law practitioners real concern. Since the Sentencing Reform Act was passed, every part of the criminal justice system has exponentially increased -- every part, except for criminal trials. That trials have almost completely vanished -- which is directly tied to the passage of the federal sentencing guidelines -- is a huge cause of concern for our adversary system of justice. Trials help develop the law. They expose and discourage abusive law enforcement practices. Trials deter the filing of weak cases and “gray area” prosecutions. And trials allow citizens to

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the past 25 years are troubling because they displaced acquittals at a higher rate than ... trial convictions.”); Finkelstein, Michael O., *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293 (1975) (concluding after statistical analysis that at least one third of all defendants pleading guilty in districts with high guilty plea rates would ultimately have escaped conviction had they not pled).

<sup>3</sup>These statistics were gleaned from <http://www.uscourts.gov>.

<sup>4</sup>There are, of course, numerous examples. One of the classics was James Olis, a securities fraud case concerning Dynegy Corporation in Houston, Texas. Olis was sentenced to 24 years in prison after trial, while his boss who testified against him received about a year. One lawyer, David Gerger, was quoted as saying: “If there’s a 20-year penalty for going to trial, then innocent as well as guilty people will simply decide they have to give up their right to a trial.” The case was ultimately reversed, and Olis was resentenced to 6 years. Until the reversal, prosecutors in Houston expressly mentioned Olis to any fraud defendant who wouldn’t plead: “You can plead or risk ending up like Olis.” Prosecutors in every district have their own “Olis line.”

observe and more directly participate in their democracy.<sup>5</sup> As John Adams said: "It is more important that innocence be protected than it is that guilt be punished. ... If innocence itself is brought to the bar and condemned, then the citizen will say, whether I do good or whether I do evil is immaterial, for innocence itself is no protection. And if such an idea as that were to take hold in the mind of the citizen that would be the end of civilization whatsoever."

Trials have disappeared for a number of different reasons. Some of these reasons include:

- **The Sentencing Guidelines, especially when they were mandatory, shifted power from judges to prosecutors and probation officers.** Before the sentencing guidelines, a defendant was not severely punished for going to trial. The decision regarding how much of a benefit one received for pleading guilty versus going to trial was decided by the trial judge. The guidelines shifted that control from judges to prosecutors. Prosecutors now engage in charge and fact bargaining in plea agreements so that defendants, even innocent defendants, have huge incentives to resolve their cases with a plea. Henry Alford explained this risk in stark terms: "I ain't shot no man, but I just pleaded guilty because they said if I didn't they would gas me for it." *North Carolina v. Alford*, 400 U.S. 25, 28 (1970).

Although the sentencing guidelines were premised on sentencing defendants based on "real offense" conduct, the "real offense" simply became a bargaining chip. Judicial discretion has been replaced by prosecutorial discretion. Now prosecutors and defense lawyers engage in fact and charge bargaining to resolve cases, which has resulted in disparate results. In addition, there are inconsistent standards around the country for 5K1.1 motions, fast-track departures in immigration cases, minor role reductions for couriers, and so on. Judicial application of the guidelines is also inconsistent around the country. Accordingly, the goal of sentencing based on "real offense" conduct has not been accomplished by the guidelines.

- **The Guidelines are often determined based on "evidence" and "testimony" that is not tested and is at best, merely hearsay, and at worst uncharged or acquitted**

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<sup>5</sup>Srebnick, Scott, "Why Trials Matter." Presentation to National Association of Criminal Defense Lawyers (Tampa, Florida; October 2008); Kecker, John W., "The Advent of the 'Vanishing Trial': Why Trials Matter." *The Champion* (September/October 2005).

**conduct.** Civil lawyers and non-lawyers, when told that a defendant can be sentenced based on uncharged or acquitted conduct, are in utter disbelief. And rightfully so. Guideline levels are often determined from a presentence investigation report that itself is based on the most unreliable of hearsay. It is possible – indeed, not uncommon – to be charged and convicted of a relatively minor quantity of drugs or low dollar amount of fraud, but face a sentence of many multiples of that, based on hearsay statements concerning uncharged and unproved “relevant conduct” related by a case agent to a probation office. The problem is not merely a lack of confrontation: rather, such procedure leads to unreliable and speculative guideline levels.

Probation officers are simply not equipped to do “offense summaries” or guideline calculations. In practice, the offense summary is just the probation officer parroting back what a prosecutor or agent told the probation officer. For example, a probation officer should not be called upon to determine the market capitalization loss caused by a sophisticated financing transaction at a publicly traded company. The officer has no specific training or expertise in these areas, so it is not surprising that probation officers faced with doing loss calculations often just rely on the prosecutor. But this is not an independent investigation as required by the rules.

- **The Guidelines are far too harsh, especially for first-time non-violent offenders who proceed to trial.** Former President George Bush recognized how severe the guidelines are for first-time non-violent offenders. In commuting Scooter Libby’s 30-month sentence and calling it “excessive,” he said: “Mr. Libby was a first-time offender with years of exceptional public service and was handed a harsh sentence based in part on allegations never presented to the jury.” He continued, “My decision to commute his prison sentence leaves in place a harsh punishment for Mr. Libby. The reputation he gained ... is forever damaged. His wife and young children have also suffered immensely. He will remain on probation. The significant fines imposed by the judge will remain in effect. The consequences of his felony conviction on his formed life as a lawyer, public servant and private citizen will be long-lasting.”

Despite Mr. Bush’s sentiment, criminal practitioners see outrageously harsh sentences doled out in federal court every day. A secretary making \$40,000 a year, working for a company engaged in a very substantial fraud, recently faced a sentencing guideline sentence of 15 years in prison, while her bosses who pled and cooperated were sentenced to 5 years (the statutory maximum to the 371 conspiracy

count to which they pleaded). She was a first-time, low-level offender with two young children who decided to proceed to trial. She was offered a plea to a five-year maximum count with other sentencing concessions, which likely would have resulted in a sentence of 2 years or less. The reason her sentence was so high was because of the trial penalty discussed above, but also because she was held responsible for the entire amount of loss, which unduly drives sentences in fraud cases.

- **Many district judges still mechanistically follow the Guidelines.** The Supreme Court told us in *Booker*, and repeatedly since then, that sentencing requires individualized attention to each defendant. Not only is this now a matter of constitutional law, but it also makes common sense. So far, though, *Booker* is a lost promise in our district courts. For 25 years, judges felt legally and psychologically that they had to rely on the guidelines. *Booker*, *Gall* and other cases give judges the discretion they need to be fair. More than that, they teach that it is unconstitutional for a district judge to rely on the guidelines as presumptively correct. But change is hard, and since *Booker*, little has changed.

The Sentencing Commission's website is very impressive. It is a valuable tool for practitioners and judges. The statistics that the Commission publishes are extremely useful, and they demonstrate that sentencing has not really changed since *Booker*. Before *Booker*, about 64% of cases were sentenced within the guidelines, while after *Booker* the number has been 61.4%. And most of the cases (more than two-thirds) sentenced below the guidelines are government-sponsored motions based on cooperation.

Putting aside the statistics, the Supreme Court has recognized, twice this year already, that lower courts are putting too much weight and emphasis on the guidelines. In *Spears v. United States*, 2009 WL 129044 (Jan. 21, 2008), the Court emphasized that lower courts are in no way bound to apply the sentencing guidelines, and can impose a sentence lower than the guidelines even if that sentence is based solely on the district judge's disagreement with them:

[E]ven when a particular defendant in a crack cocaine case presents no special mitigating circumstances – no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation – a sentencing court may nonetheless vary downward from the advisory guideline range. The court

may do so based solely on its view that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates “an unwarranted disparity within the meaning of § 3553(a)” and is “at odds with § 3553(a).” The only fact necessary to justify such a variance is the sentencing court’s disagreement with the guidelines – its policy view that the 100-to-1 ratio creates an unwarranted disparity.

The Supreme Court didn’t stop there. In another summary reversal, *Nelson v. United States*, 2009 WL 160585 (Jan. 26, 2009), the High Court reversed the Fourth Circuit for affirming a within-guidelines sentence despite the judge’s statements at sentencing that “the Guidelines are considered presumptively reasonable” and that “unless there’s a good reason in the [3553(a)] factors . . . , the Guideline sentence is the reasonable sentence.” The Supreme Court explained, “The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable. We think it plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson’s Guidelines range. Under our recent precedents, that constitutes error.”

## II. *Proposed Changes.*

For some reason, lower courts still feel bound to mechanistically impose the sentencing guidelines, even though the Supreme Court repeatedly is saying to stop. So what can be done? I propose the following:

- **Reduce the harshness of the Guidelines, especially for first-time non-violent offenders.** The Commission should encourage District Courts to issue downward variances if there is a finding that an offender is a first-time non-violent offender. The Commission has conducted recidivism studies which demonstrate that first-time non-violent offenders are not likely to recidivate. Those findings should be incorporated into the Guidelines. Other examples include offenders who are: over the age of 40, married, have a college education, are not drug users, and so on.
- **Incorporate the 3553 factors into the Guidelines.** As explained earlier, the guidelines drive sentencing in our courts. To really breathe life into *Booker’s* guarantee that sentencing be tailored to each individual, the word must come from the Sentencing Commission itself. The Commission can do more than any other group now to honor the mandates of *Booker* and *Gall*: namely, the

Commission should issue guidance to District Courts that they may not rely on the guidelines as presumptively correct.

- **Simplify the Guidelines.** Because the Guidelines are no longer mandatory, the Commission should simplify the Guidelines and have broader categories of cases. The perfect example is the fraud guideline 2B1.1, which has fifteen different specific offense characteristics, each with numerous sub-parts. That guideline has 16 pages of application notes, attempting to explain how those specific offense characteristics should be applied. That guideline has spawned countless appellate decisions, making contested fraud sentencings an almost impossible morass.
- **Attempt to eliminate the penalty for proceeding to trial.** The United States Supreme Court said in *Booker* that the right to trial by jury “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” But as explained earlier, trials are dying, and sadly, many have come to simply accept the trial penalty in federal court. This culture does not exist in state courts. For example, the Florida Supreme Court has held that “the law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.” *Wilson v. State*, 845 So. 2d 142 (Fla. 2003). Defendants who proceed to trial should not receive sentences 500 times higher than those who plead and cooperate. The Commission should address this issue.
- **Inform juries of the minimum and maximum sentences.** The Commission has asked what recommendations it should make regarding the Federal Rules of Criminal Procedure, and this is one of them. Judge Weinstein recently explained the importance and historical underpinnings of informing juries of potential sentences. See *United States v. Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. April 1, 2008) (Weinstein, J.) (granting new trial – in a 288 page opinion – for failing to inform jury of five year minimum mandatory sentence). Information regarding the consequences of a verdict is not irrelevant to the jury’s task. Absent such information, jurors cannot maintain a knowledgeable and open dialogue during deliberation, and the jury’s

ability to perform its historical function – bringing the voice and values of the community into the courtroom – is undercut. *See, e.g., United States v. Gilliam*, 994 F.2d 97, 100-101 (2d Cir. 1993) (jury serves as a mechanism by which accused can be judged according to community's mores). Only a jury that understands the implications of its actions, having obtained "information and knowledge in the affairs and government of the society," can "come forward, in turn, as the sentinels and guardians of each other."<sup>11</sup> *Letters of the Federal Farmer IV*, 54, 59. In any event, informing juries about the minimum and maximum penalties associated with a specific offense is not unheard of. In many instances, juries learn of the existence and harsh effects of mandatory minimums in criminal trials through the cross-examination of cooperating witnesses. Courts routinely permit inquiry – as the Confrontation Clause requires they must – into the possible self-interest of cooperating witnesses, including pending indictments, plea agreements, and leniency in sentencing. *See, e.g., United States v. Rosa*, 11 F.3d 315, 336 (2d Cir. 1993).

- **Continue to use probation officers to do background for the judge on the offender, but not on the offense.** Because probation officers are not lawyers, are not trained on how to calculate complex loss figures, do not have appropriate resources, and spend most of their time with prosecutors, they should not be called on to calculate the guidelines, which end up being arbitrary, biased and speculative. These guideline calculations take on a false degree of credibility because they appear in a PSR format. The offense conduct and guideline calculations ought to be litigated by the lawyers, or if agreed to, can be jointly submitted and included in a PSR. The offender's background is a task that the probation officer is well-equipped to handle and can be supplemented by the parties if necessary.

Alexis de Tocqueville rightly saw juries as the quintessential American quality: "The jury, the most energetic method of asserting the people's rule, is also the most effective method of teaching them how to rule."<sup>6</sup> Without some help – help that can be provided by the United States Sentencing Commission – jury trials may soon completely die out.

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<sup>6</sup>Alexis de Tocqueville, *Democracy in America* (1835).

*Alan DuBois*  
*Senior Appellate Attorney*  
*Federal Public Defender*  
*E.D. N.C.*

Alan DuBois is the Senior Appellate Attorney for the Federal Public Defender's Office for the Eastern District of North Carolina. He graduated from Duke University in 1984 and the University of Virginia School of Law in 1987. In 1989, after two years as a staff law clerk at the United States Court of Appeals for the Fourth Circuit, he joined the Federal Public Defender's Office. In 2005, he was the visiting federal defender at the United States Sentencing Commission and also served as a visiting attorney with the Legal Policy Branch of the Office of Defender Services in Washington, D.C.

*Amy Levin Weil*  
*Atlanta, Georgia*

Amy Levin Weil, founding partner of The Weil Firm in Atlanta, served for 25 years as a federal prosecutor in the United States Attorney's Office for the Northern District of Georgia, United States Department of Justice. For 18 years, from 1990-2008, she served as Chief of the office's Appellate Division. From 1992-95, Ms. Weil served as her office's Senior Litigation Counsel; from 1987-93 she prosecuted a wide range of violent crime and drug cases in the General Crimes Section of the Criminal Division and from 1983-87 she represented the United States in civil litigation as an Assistant United States Attorney in the Civil Division.

Ms. Weil was appointed by the Attorney General of the United States to serve on the Department of Justice's Appellate Chiefs Working Group (ACWG), which advises the Attorney General on appellate matters and helps shape legal positions for the Department of Justice. Ms. Weil served on the ACWG from 2003 until 2008.

Ms. Weil also has been an active member of the appellate bar. In 1998, she was appointed by the Chief Judge of the United States Court of Appeals for the Eleventh Circuit to serve on the Eleventh Circuit's Lawyers Advisory Committee (LAC), which advises the Court on proposed rules of practice. Ms. Weil served on the LAC for nine years, the last four years as Chair of the Committee. Currently, Ms. Weil is the Chair-elect of the Appellate Practice Section of the State Bar of Georgia. Ms. Weil was instrumental in establishing and organizing the Eleventh Circuit Appellate Practice Institute (ECAPI), a biennial appellate seminar sponsored by the Appellate Practice Sections of the Alabama, Florida and Georgia Bar Associations.

Ms. Weil has authored several articles on appellate practice, criminal law and sentencing, and is a frequent speaker.

PLACEHOLDER FOR TESTIMONY  
OF

Amy Levin Weil





**UNITED STATES SENTENCING COMMISSION  
ATLANTA, GA  
FEBRUARY 10-11, 2009  
PUBLIC HEARING**

**Panel Four**  
**VIEW FROM LAW ENFORCEMENT**



PUBLIC HEARING  
FEBRUARY 10, 2009  
ATLANTA, GEORGIA

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**V. View from Law Enforcement**

**3:15 p.m. - 4:45 p.m.**

*William N. Shepherd  
Statewide Prosecutor  
Office of Statewide Prosecution  
Tallahassee, FL*

*Chief John Timoney  
Miami Police Department  
President, Police Executive Research Forum*

*Captain Larry Casterline  
Commander, Major Crimes Deterrence and Prevention  
High Point Police Department  
High Point, NC*

This panel is expected to address the ways that local law enforcement works with federal law enforcement, particularly in the area of gangs and drug trafficking. Panelists are likely to describe some of their successful programs and identify ways that the federal sentencing system can emulate them.

*William N. Shepherd*  
*Florida Statewide Prosecutor*  
*Palm Beach County, Florida*

William N. Shepherd is Florida's Statewide Prosecutor. He leads an office of approximately thirty-five prosecutors who operate in eight Florida cities. Their work focuses on the investigation and prosecution of organized criminal activity in the area of racketeering through fraud, theft, narcotics, and money laundering. He also serves as the Legal Advisor the Statewide Grand Jury convened by the Florida Supreme Court to study and prosecute criminal gangs throughout Florida. Because of the proactive nature of the office's practice, Statewide Prosecution is involved in criminal cases from the inception of the investigation through the final jury verdict.

Mr. Shepherd also serves as a Member of Florida's Violent Crime and Drug Control Council and is Commission Attorney to Florida's Criminal Justice Standards and Training Commission. Outside of his official duties, Mr. Shepherd is an Adjunct Professor at Florida Atlantic University. He is Vice Chair at Large for the American Bar Association's Criminal Justice Section, a founding Member of the Board of Directors of the Miami Lawyer's Chapter of the Federalist Society, and a past State Chair of the United States Supreme Court Historical Society. He is a graduate of Georgetown University and the Georgetown University Law Center and served as law clerk to United States District Court Judge Stephen N. Limbaugh.

WILLIAM N. SHEPHERD  
STATEWIDE PROSECUTOR  
FLORIDA ATTORNEY GENERAL'S OFFICE

PRESENTED TO THE  
UNITED STATES SENTENCING COMMISSION

FEBRUARY 10, 2009

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Chairman Hinojosa, I would like to thank you and the Members of the Commission for the opportunity to address you this morning and would like to applaud your work throughout the years to strengthen and adapt the guidelines as we face new challenges. Today I will address the issues of gang violence in the State of Florida and the response of Attorney General Bill McCollum and my Office of Statewide Prosecution.

I am William N. Shepherd, Florida's Statewide Prosecutor. I lead thirty-five prosecutors stationed in our eight Bureaus throughout the state where we focus exclusively on multi-circuit organized criminal activity. The Office was created in 1986 by the voters of Florida through a Constitutional Amendment to the state constitution. That Amendment and the enabling statutes outline our jurisdiction and our mission. We are housed in the Office of the Attorney General and serve as the prosecutorial arm of his office.

When Attorney General McCollum first appointed me in 2007, he expressed his desire to confront the growing gang problem and render gangs ineffectual. At his direction and with his support, we have embarked on an aggressive agenda to investigate and prosecute gangs using Florida's Racketeering laws.

### *Scope of the Gang Problem*

Florida has over 1,000 gangs and 65,000 gang members scattered throughout our state. They are the primary outlet for street level drug sales and are involved in a number of other criminal activities which include prostitution and smuggling.

Although the problem is most often categorized as an issue for urban areas, rural areas are not immune. Florida's Department of Corrections reports that it has received new gang member inmates from every judicial circuit in Florida. We are seeing gang movement from urban areas to more rural areas where members believe there is less of a law enforcement presence. In a recent trip to North Central Florida, a gang detective reported to me that within the last month he had arrested gang members on fugitive felony warrants from Miami, Tampa, and Jacksonville. The ease with which we move commerce through our state allows gangs to access that free flow for their own organizational interests.

In the areas that are the hardest hit by gangs we see an escalation of gun violence. Search warrants routinely uncover firearms that include handguns and semi-automatic pistols and rifles. Evidence displays often resemble small armories. Street violence used to enforce geographic crack cocaine drug monopolies is augmented by violence associated with rivalries over respect and "colors". Violence inspired by a traditional profit motive is supplemented by wanton violence for no apparent reason other than violence itself.

Gang members generally come from challenging socioeconomic backgrounds and range in age. A large percentage of gang members are juveniles, but their age does not diminish their potential for violence or their commitment to the gang lifestyle. Unfortunately, we also see that gang activity is not simply "outgrown" as offenders mature. Many gang members are "born into" the gang because their father was in the gang or their older brother is a gang member. The other surprising development is that female gang members are no longer merely there as the

gang member's girlfriend, but are now active members of gangs themselves. A recent interview with a young woman south of Tampa revealed that she went along on drive-bys and gladly carried out the "Blast on Sight" order of her gang superiors.

#### *Law Enforcement Response*

Florida law enforcement has been aware of the overall problem of gangs for decades, but with the upswing in gang activity, we have refocused our efforts to attack the problem head on. The Florida Department of Law Enforcement, Police Departments, and Sheriff Offices around the state are starting specific gang units and regional groups are working cases together using the task force model.

To complement the police efforts, Florida's prosecutors are also working together to build cases that use the best resources put forth by law enforcement. The chart below illustrates our work over the last eighteen months.

#### **Gang Initiative Since 2008 - Filed Cases**

<i>Gang</i>	<i># of Defendants</i>	<i>Operating Area</i>
Sur-13 JAD	13	S. Florida
Sur-13 Gang Investigator of the Year	14	S.W. Florida
Black MOB	9	C. Florida
TOP 6	12	S. Florida
Bloods	13	N.E. Florida
773 Boyz	8	N. Florida
Brown Pride Locos	9	S. W. Florida
Third Shift	12	S. W. Florida

Our prosecution strategy calls for attacking the gang as a unit by using Florida's Racketeering statutes. This allows us to work with local and state law enforcement to build a

case against the entire enterprise and then execute arrest warrants and search warrants in a coordinated manner. Overnight, this returns the neighborhood to the hardworking people who live and work in that area. Anecdotal success comes in remarks like the one by a South Florida neighborhood pastor who approached a uniformed officer to pass along his thanks and the thanks of his congregation to “whoever made that happen” and made it possible for him to walk nearby streets without fear. As the chart below demonstrates, we are beginning to see statistical evidence that supports such anecdotal reports.

### **2008 Gang Initiative – Early Statistical Results**

- Manatee County – Violent Crime ↓ 14%
- Palm Beach County – Westgate Calls for Service ↓ 16%
- Flagler County – Gang Sgt. Reports Only 2 Incidents Since December
- Gadsden County – Narcotics Lt. – Drug Sales Cut in Half
- Hillsborough County – Plant City, V. C. ↓ 20 % - Robbery ↓ 36%

#### *State Sentencing Tools*

The State of Florida has a formalized sentencing structure established by the Florida Legislature that is known as the Criminal Punishment Code. This Code has gone through various forms since its inception as the Florida Sentencing Guidelines in 1983. What at one time offered a minimum and maximum sentence within the legislated range now only sets a minimum legal sentence and allows the statutory maximum to serve its legislated function. Like other sentencing models, the Criminal Punishment Code assigns individual numeric values for

criminal violations. The Code gives the highest point value to the crime to be sentenced and then offers a reduced value for crimes that comprise the defendant's criminal history. Once the primary offense value is calculated and prior record points are added, a subtotal sentence value is established.

In a gang case, there is an additional step in calculation after the subtotal is established. The Code allows for an enhancement by a multiplier of 1.5 if the offense is a criminal gang offense as defined by statute and the code. This multiplier increases the lowest permissible sentence but has no impact on the statutory maximum exposure the defendant faces (Exhibit 1).

The 2008 anti-gang law also provided for another type of enhancement in gang cases (Exhibit 2). During deliberations, the fact finder may find that the criminal activity is a gang crime pursuant to enumerated criteria in the statute. If the fact finder makes that determination, it increases the defendant's crime one felony level – making, for example, a third degree felony a second degree felony. This decision by the fact finder increases the statutory maximum for the defendant's criminal conduct and provides the court with additional sentencing options while not impacting the lowest permissible prison sentence.

Another factor in analyzing gang sentencing options is the application of Florida's various career offender statutes. In addition to the 10-20-Life statute for specific firearm offenses and the Prison Releasee Re-offender Act which requires maximum sentence upon meeting various criteria on primary offense and release status, Florida has statutes for Habitual Felony Offenders, Habitual Violent Felony Offenders, Three-time Violent Felony Offenders, and various other specialized career offender sentences. Given the nature of the criminal gang life, it is not uncommon for special sentencing career criminal statutes to apply.

## *Solutions Beyond Sentencing*

Upon Petition by Florida's Governor Charlie Crist and order of the Florida Supreme Court, I convened a Statewide Grand Jury empanelled in Palm Beach County for a period of eighteen months. That Statewide Grand Jury issued indictments and formal suggestions to the public and the Florida Legislature in documents called Presentments. This Presentment power allows the Statewide Grandjurors the opportunity to examine a specific issue using their subpoena power and then make very specific detailed recommendations for improvement.

The Eighteenth Statewide Grand Jury issued two Presentments related to Florida's gang problem. The first, entitled *First Interim Report of the Statewide Grand Jury: Criminal Gangs and Gang Related Violence* (Exhibit 3), was issued in December of 2007 and focused on ways existing statutes could be strengthened to give law enforcement better tools to address the problems of gangs in Florida. The second, entitled *Third Interim Report of the Statewide Grand Jury: Prevention, Intervention, and Rehabilitation Response to Criminal Gangs* (Exhibit 4), was issued in July of 2008 and focused on the solutions to gang violence that cannot be found through law enforcement alone.<sup>1</sup>

Attorney General Bill McCollum simultaneously took the lead at the executive level. He formed a work group of the agency heads of state government who have any jurisdiction for issues dealing with children. The group was comprised of the Department of Children's and Family Services, the Department of Juvenile Justice, the Department of Corrections, the Department of Law Enforcement, the Department of Education, the Office of Drug Control Policy, the Highway Patrol, the Florida Sheriffs Association, the Florida Police Chiefs Association, and the Florida Prosecuting Attorney's Association.

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<sup>1</sup> The Statewide Grand Jury was also called upon to look at the problem of money laundering in the check cashing industry in Florida and that was the subject of the Second Interim Report.

The strategy developed by the executive work group calls for stopping the growth of gangs in Florida, reducing the number of gangs and gang members, and rendering gangs ineffectual (Exhibit 5). The strategy is carried out through seven regional coordinating councils created in statute that bring together a broad spectrum of interested parties including educators, faith based groups, and law enforcement groups to share information so that effective programs can be targeted at the key areas. The Attorney General has personally lead six of these regional workshops already and is holding the final day long organizational meeting in the South Florida region tomorrow.

All of us in law enforcement realize that we will not be able to arrest and sentence our way out of the problem of growing gang violence. However, we also realize that without strong laws and sentencing structures in place we will not be able to protect neighborhoods from the worst offenders and give the hard working people of our state the chance to live, work, and raise a family without the threat of gang violence. I appreciate the opportunity to speak to the Commission today, complement you on your outreach to study state problems and the solutions being developed at the state level, and congratulate the Commission on its twenty-five years of service.

*John F. Timoney*  
*Chief of Police of Miami*  
*President Police Executive Research Forum*

John Timoney joined the New York Police Department after graduating from high school and rose through the ranks of the NYPD. He became a narcotics specialist, and was promoted to sergeant in 1980. In 1994 he was appointed Chief of Department, the youngest ever to fill that role. He ultimately served as Commissioner Bill Bratton's first deputy. In March 1998, Philadelphia mayor Ed Rendell appointed Chief Timoney as Philadelphia Police commissioner. After leaving the Philadelphia police, Chief Timoney returned to consulting and worked for a security firm in New York. In 2003, Chief Timoney became the Chief of Police of Miami. Chief Timoney earned a bachelor's degree from the John Jay College of Criminal Justice, a master's degree in American history from Fordham University, a master's degree in urban planning from Hunter College, and is a graduate of the Police Management Institute at Columbia University.

*Police Executive Research Forum (PERF)*

The Police Executive Research Forum is a national membership organization of progressive police executives from the largest city, county and state law enforcement agencies. PERF is dedicated to improving policing and advancing professionalism through research and involvement in public policy debate. Incorporated in 1977, PERF's primary sources of operating revenues are government grants and contracts, and partnerships with private foundations and other organizations.

PERF assumes leadership on the difficult issues facing police. We encourage debate among members and the wider criminal justice community on controversial issues that affect public safety; fear of crime; and fair, humane treatment of all members of society. PERF is a leading voice in the media, legislative arena and among policy-makers for progressive policing. Two examples of PERF initiatives include:

- Balancing Crime Strategies and Democratic Principles
- Reducing Violent Crime Through Clergy-Police Collaboration

PLACEHOLDER FOR TESTIMONY  
OF

Chief John Timoney  
Miami Police Department  
President, Police Executive Research Forum

*Captain Larry Casterline*  
*Commander Major Crimes Deterrence and Prevention*  
*High Point Police Department*  
*High Point, North Carolina*

Captain Casterline has been with the High Point Police Department for nineteen years. He began on patrol and has worked in many divisions including street crimes, narcotics, and the gang unit. He is currently the Commander of the Major Crimes Deterrence & Prevention Division which oversees crimes including homicide, gang activity, and narcotics. Captain Casterline is from Newton, New Jersey and earned his undergraduate degree from Salisbury University on the Eastern Shore of Maryland. He earned a graduate police leadership degree through the Administrative Officers Management Program at NC State, and another graduate leadership degree from the Southern Police Institute at the University of Louisville.

*City of High Point, North Carolina*  
*2007 Winner Innovation Award Winner, Harvard Kennedy School*  
*Overt Drug Market Strategy*

A decade ago, street-level drug dealing and its attendant criminal activity, from assaults to prostitution, were rife in High Point, North Carolina. The police force was both ineffectual and it had alienated the community with the use of strong-arm police tactics.

To mend the relationship between law enforcement and community members while also combating crime more effectively, the High Point Police Department adopted a new approach known as the Overt Drug Market Strategy (ODMS). ODMS combines crime mapping, community policing and a new accord with drug dealers.

Police first identify crime-ridden neighborhoods in High Point. They then begin a program of aggressive intelligence gathering to identify and build cases against the most active dealers. Violent offenders are aggressively prosecuted.

But the program reserves an alternative strategy for drug dealers who lack a history of violent behavior. Police “call in” these dealers, with the assurance that they will not be arrested, to a meeting where family and community members speak to the damage that their criminal behavior causes loved ones and neighbors. The dealers are given an ultimatum: Either stop selling drugs—and reap the benefits of employment, affordable housing, and educational programming—or face arrest.

The Police Department has not eliminated the drug trade in High Point, but it has successfully reduced violent crime in High Point by an average of 51 percent. The High Point Police Department is additionally reaching out to law enforcement agencies across North Carolina and the country to assist them with the implementation of parallel efforts in their jurisdictions. The cities of Winston-Salem, Greensboro, and Raleigh have already employed similar strategies. The National Urban League has also invited High Point police officers to many cities to describe their violence-reduction tactics to local leaders, prosecutors, and law enforcement agents in the hopes of fostering replication of the ODMS throughout the country.

From <http://www.innovations.harvard.edu/>